(1)

Supreme Court, U.S.
FILED

No. 98 1810 MAY 10 1999

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

SHERRY L. McGINNIS, *Petitioner*
v.
ANCHORAGE SCHOOL DISTRICT, *Respondent*

SHERRY L. McGINNIS, *Petitioner*
v.
ANCHORAGE EDUCATION ASSOCIATION, *Respondent*

SHERRY L. McGINNIS, *Petitioner*
v.
JOHN PATTERSON, *Respondent*

SHERRY L. McGINNIS, *Petitioner*
v.
CHANCEY CROFT, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Sherry L. McGinnis
Counsel of Record, *Pro se*
3802 Rosecrans Street #131
San Diego, CA 92110
(619) 291-3421

91PP

Adjudicated on summary judgments, affirmed without remark except "for the reasons stated by the district court," were this teacher's Complaint causes of action for wrongful termination of tenured public employment, discrimination based on medical condition, and Alaska statutory and common law claims. Five questions of national importance are raised by the Ninth Circuit's courts' summary dispositions:

1. Is Fourteenth Amendment due process denied public school teachers by Alaska statute wherein the only provision for a hearing regarding a termination of tenure is a 15 day request period to seek a hearing, commencing after the teacher has been given his/her notice of termination?

2. Does the Ninth Circuit's criterion of review of summary judgment motions apply the precedent of Celotex Corp. v. Catrett, in a manner that improperly shifts the burden of proof to non-moving parties on causes of action that are based upon the moving party's failures to act (e.g. a wrongful termination due to a non-reinstatement)?

3. When *de novo* is the mandatory standard of review on appeals from summary judgments, does a court of appeals deny meaningful, *de novo*, review of the errors briefed on appeal by ordering the appeal submitted on the briefs and by rendering a one sentence decision announcing the court affirms the summary judgments solely "for the reasons stated by the district court in its orders"?

4. Are the Ninth Circuit's courts utilizing appropriate criteria to evaluate the merit of appeals based on state law precedent, and prior to levying sanctions under Federal Rules of Appellate Procedure, Rule 38?

5. Is additional guidance or renewed Supreme Court instruction warranted on what due process is required before a public school teacher's tenure may be taken, since courts in the Ninth Circuit have not followed precedent mandating a pretermination hearing?

TABLE OF CONTENTS

Page

Questions Presented For Review i

Table of Cited Authorities vi

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons For Granting The Petition 4

I. Alaska's tenured teachers are stripped of the "root requirement" of due process prior to termination of their public employment under Alaska statute and under the Ninth Circuit's interpretation of "when" the dismissal becomes effective 4

II. The Ninth Circuit's criterion upon non-moving parties in order to withstand summary judgment motions, imposes an impossible burden of proof requirement and creates an irreconcilable conflict between precedents 6

A. It is impossible to prove "non-reinstatement" 6

TABLE OF CONTENTS, continued

Page

B. An irreconcilable conflict presently exists between the Ninth Circuit's negative proof test and the requirement to draw inference(s) in favor of the non-moving party 8

III. *De novo* review is denied *ipso facto* when a court of appeals affirms summary judgments on briefs and solely "for the reasons stated by the district court in its orders": A narrow, definitive rule is warranted 9

IV. Guidance is needed by the Ninth Circuit as to the criteria to be used to evaluate the merit of appeals, for the purpose of sanctioning appellants, that rely upon state law and upon the state's highest court's interpretation of that law to show the appeal has merit 10

V. Either confusion regarding precedent or a deliberate refusal to follow precedent is shown by the Ninth Circuit's decisions that are directly counter to the outcome required by precedents of the highest court of the State and precedent of the Supreme Court of the United States 13

CONCLUSION 14

TABLE OF CONTENTS, continued

Page

Appendix A - Decision on Appeal 1a
Appendix B - Order Denying Rehearing 4a
Appendix C - Order to Show Cause 7a
Appendix D - Order on Sanctions 10a
Appendix E
District Court's 1st Summary Judgment 14a
District Court's Order Denying Rehearing 36a
District Court's 2nd Summary Judgment 37a
District Court's Final Summary Judgment 44a
Appendix F
Constitution of the United States
Amendment XIV 58a
Alaska Statute, AS 14.20.180 ..... 58a
Federal Rules of Appellate Procedure
Rule 38 ..... 59a
Appendix G - Alaska Court Order for
"Immediate" Reinstatement 60a
Appendix H - Dismissal Letter 62a
Appendix I - Response to the Panel's Order to
Show Cause 64a
Appendix J
Affidavit of Principal Bowie (excerpt) 67a
Affidavit of Respondent Croft (excerpt) 70a

TABLE OF CITED AUTHORITIES

Cases

Page

Board of Education, Fairbanks North Star Borough School District v. Ewig, 609 P.2d 10 (Alaska 1990) 7

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 6, 8

City of Vernon v. Southern California Edison, 955 F.2d 1361 (9th Cir. 1992) 8-9

Cleveland Board Of Education v. Loudermill, 470 U.S. 532 (1985) 4-5, 13-14

Jones v. Wadsworth, 791 P.2d 1013 (Alaska 1990) 8

Kenai Peninsula Borough Board of Education v. Brown, 691 P.2d 1034 (Alaska 1984) 4, 11, 13-14

Kodiak Oilfield Haulers, Inc. v. Local 879, 641 P.2d 11 (Alaska 1982) 7

Odum v. University of Alaska, Anchorage, 845 P.2d 432 (Alaska 1993) 14

Redman v. Department of Education, 519 P.2d 760 (Alaska 1974) 7

United States v. Silverman, 861 F.2d 571 (9th Cir. 1988) 10

TABLE OF CITED AUTHORITIES, continued

Cases

Page

University of Alaska v. Chauvin,
521 P.2d 1234 (Alaska 1974) 7

Ward v. Village of Monroeville,
409 U.S. 57 (1972) 9

Constitution of the United States

Amendment XIV 2, 4

Statutes

United States Code
28 U. S. C. section 1254(1) 2
28 U. S. C. section 1332 3
28 U. S. C. section 2403(b) 2
Alaska Statutes
AS 14.20.180 ..... 2, 4, 14

Federal Rules

Federal Rules of Appellate Procedure
Rule 38 ..... 2, 10, 12-13

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

SHERRY L. McGINNIS, *Petitioner*
v.
ANCHORAGE SCHOOL DISTRICT
ANCHORAGE EDUCATION ASSOCIATION
JOHN PATTERSON, and
CHANCEY CROFT, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sherry L. McGinnis ("teacher") petitions for a writ of certiorari to review the decision in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' decision, denial of rehearing, and order of sanctions were unreported (Apps. A-D, *infra*, 1a-13a). The summary judgments of the district court and order denying rehearing were unreported (App. E, *infra*, 14a-57a). The underlying Alaska state court decision ordering the employer to "immediately" reinstate teacher was unreported (App. G, *infra*, 60a-61a).

JURISDICTION

On December 21, 1998, the decision of the court of appeals was entered (App. A, *infra*, 1a-3a). On February 12, 1999, the court of appeals entered its decision denying teacher's timely filed

motion for rehearing (App. B, *infra*, 4a-6a). Jurisdiction of this court is invoked pursuant to 28 U. S. C. §1254(1).

The constitutionality of Alaska statute AS 14.20.180 is in question: Therefore, 28 U. S. C. §2403(b) may apply and service of process of this petition upon the Attorney General of the State of Alaska is made as shown on the proof of service filed herewith. The courts below did not certify to the Alaska Attorney General that the constitutionality of AS 14.20.180 was in question.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV
(App. F, *infra*, 58a)
Alaska Statute, AS 14.20.180
(App. F, *infra*, 58a-59a)
Federal Rules of Appellate Procedure, Rule 38
(App. F, *infra*, 59a)

STATEMENT OF THE CASE

Teacher recovered $100,000 toward medical care for an on-the-job injury and was granted judgment in state court that ordered "immediate" reinstatement after finding that the Anchorage School District's prior act of terminating this teacher, while she was incapacitated by her injuries, was without merit (App. G, *infra*, 60a-61a). To reinstate tenure, Alaska statutes and precedents require school districts to tender to the teacher a written teaching contract, textbooks, and back pay. The school district concedes that when teacher left the job-site, 71 days after the state court ordered action, the district had not tendered anything to her. The school district further concedes that its only subsequent act was to mail a dismissal letter to teacher that stated the district had terminated her again. The letter stated, "[y]ou may request a hearing... concerning your termination, if within 15 days... you

submit a written request" (App. H, *infra*, 63a). Teacher again sued the Anchorage School District, this time in U.S. District Court, along with the Anchorage teachers' union and two Anchorage attorneys. Teacher's Complaint alleged that: (a) her tenure was not reinstated; (b) the district's (re-)termination was without due process; (c) the district had converted $2,700 of back pay already earned, and; (d) money damages were due pursuant to negligence and other Alaska statutory and common law claims.

The four defendants moved for, and were granted, separate summary judgments. Twenty-eight specific legal errors committed by the district court were briefed on appeal, and upon teacher's motion, were consolidated for review before one panel at the Ninth Circuit Court of Appeals. *Sua sponte* the panel ordered the appeal submitted on the briefs and thirteen days later the panel affirmed without remark except for "the reasons stated by the district court in its orders" (App. A, *infra*, 3a).

The district court identified jurisdiction on its docket sheet as "federal question - U.S. not a party" and as 28 U. S. C. §1332 diversity of citizenship. When the suit was filed all defendants were domiciled in Alaska, teacher was domiciled in California, and the actual amount in controversy exceeded $50,000.

REASONS FOR GRANTING THE PETITION

I. Alaska's tenured teachers are stripped of the "root requirement" of due process prior to termination of their public employment under Alaska statute and under the Ninth Circuit's interpretation of "when" the dismissal becomes effective.

In 1985, this Court settled the question of "what" minimum due process was required by the Fourteenth Amendment whenever a property interest existed in continued public employment. *See*, Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Loudermill held that the "essential requirement of due process" included notice and an opportunity to respond prior to action by the public employer to terminate employment. Id. at 546. But, writing in dissent, Chief Justice Rehnquist characterized the Court's balancing inquiry in the Loudermill line of cases as "subjective," "unpredictable," and "without principled standards" such that "[e]very different set of facts will present a new issue of what process was due and when." Id. at 562-563 (Rehnquist, C.J., dissenting).

The question here is "when" is the process due, in light of a state statute that expressly creates a right to a hearing during a 15 day request period that commences after notice of dismissal has been given to the teacher.

Alaska's statute, AS 14.20.180(b), provides that a tenured teacher has 15 days after he/she receives notice of dismissal to request a hearing before the school board (App. F, *infra*, 58a-59a). The interpretation given by the lower courts was that "Alaska law..., provided [teacher] with the pre-termination right to a hearing, because 'termination is not effective until at least fifteen days following the notification of dismissal'" (App. D, *infra*, 12a, *quoting*, Kenai Peninsula Borough Bd. Of Educ. v. Brown, 691 P.2d 1034, 1037 (Alaska 1984); *and compare*, App. E, *infra*, 30a).

This Court previously stated that:

"Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before termination takes effect."

Loudermill, supra, at 543 (citations omitted).

"We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest'."

Id. at 542 (citations omitted).

The "root requirement" is not afforded Alaska's teachers either by the plain language of AS 14.20.180, or under the Ninth Circuit's statutory construction. The pretermination hearing mandated by Loudermill, is circumvented completely by the Ninth Circuit's reading of the statute's "effective" date of termination to occur after a 15 day request period has expired. This is true because, in practice as is shown in this case, the termination is already in "effect" before the employee is ever given an opportunity to seek a hearing. The employer has already invoked its discretion and has already acted to exercise its discretion by communicating to the employee, unequivocal notice that he/she has been terminated.

Teacher was told "you have been terminated" (App. H, *infra*, 63a). At this point, salary has been stopped. At this point, classroom access has been denied. At this point, the "decisionmaker" (Personnel Director, herein) has removed himself/herself from the decision-making loop. At this point, the teacher's only recourse is an appeal to the school board to reverse the Personnel Director's prior decision to terminate.

"When" has the time passed for "meaningful opportunity to invoke the discretion of the decisionmaker"? *See*, Id. at 543

(emphasis added). When is the opportunity still a pretermination hearing and when does the opportunity effectually become a post-termination appeal?

Fourteen years after announcing "what" process is due, the time has come to formulate a definitive test instructing "when" that process must be given.

II. The Ninth Circuit's criterion upon non-moving parties in order to withstand summary judgment motions, imposes an impossible burden of proof requirement and creates an irreconcilable conflict between precedents.

A. It is impossible to prove "non-reinstatement."

In the Ninth Circuit, Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), is applied where a non-occurrence is the core factual element of a cause of action (e.g. non-reinstatement of tenure, hence a wrongful termination). The result is that the non-moving party is required to do the impossible, to prove a negative, in order to withstand a motion for summary judgment. Illustrative of the impossible burden requirement is the following district court quote from, and application of, Celotex (*see*, App. E, *infra*, 21a).

> "[T]he plain language of 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party['s] case, and on which that party will bear the burden of proof at trial."
>
> Id. at 322.

Bound by the precedent of Celotex, the district court placed the burden upon teacher to prove non-reinstatement of tenure. "McGinnis offers no evidence to support her argument that

she never was reinstated" (App. E, *infra*, 34a). Had the court kept the burden upon the moving party an initial inquiry would have been necessary into what actions must the employer show (as the moving party) that it took, in order to even raise a credible claim that it had reinstated employment.

Pursuant to Alaska statutes and precedents in tenured teaching cases, an employer must tender to the teacher a written contract,[1] textbooks,[2] and back pay.[3] The record below established: (a) A 71 day period had lapsed after the state court ordered that teacher be "immediately" reinstated (App. G, *infra*, 61a); (b) Teacher came from California to the Anchorage job site, but the benefits package and the "contract was not available at the high school when Karen [a personnel department employee] said it would be." (App. E, *infra*, 17, 23a); (c) The high school principal's affidavit stated that he was "unable" to provide textbooks (App. J, *infra*, 68a at ¶7), and; (d) The employer conceded it never paid $2,700 of back pay it acknowledged it owed teacher, but asserted recovery was barred by the statute of limitations (*see*, App. E, *infra*, 29a).

Ignoring completely the state law requirements of tender of a contract, textbooks, and back pay, the district court did not give any indication of what evidence, if any, could be offered to meet its negative proof test pursuant to Celotex, in cases where non-reinstatement is alleged. The court only made clear its view that under Celotex, "[t]he moving party need not present evidence..." (App. E, *infra*, 39a). This view was adopted by the court of appeals that affirmed the summary judgments, "for the reasons stated by the district court in its orders" (App. A, *infra*, 3a).

---

[1] Redman v. Department of Education, 519 P.2d 760, 765 (Alaska 1974).

[2] Board of Education, Fairbanks North Star Borough School District v. Ewig, 609 P.2d 10, 13-14 (Alaska 1980).

[3] University of Alaska v. Chauvin, 591 P.2d 1234, 1239 (Alaska 1974); *see also*, Kodiak Oilfield Haulers, Inc. v. Local 879, 641 P.2d 11, 14 (Alaska 1982).

The Ninth Circuit's present criterion under Celotex, calls upon this Court to provide clarification and guidance to the Ninth Circuit of how to apply Celotex, in employment cases where the core allegation involves non-reinstatement of the employee.

B. An irreconcilable conflict presently exists between the Ninth Circuit's negative proof test and the requirement to draw inference(s) in favor of the non-moving party.

Lay aside the impossible burden of proof aspect, requiring the non-moving party to prove non-events creates a direct conflict with the long line of precedents that stand for the proposition that on motion for summary judgment, every fact is to be viewed, and every reasonable inference is to be drawn, in favor of the non-moving party. *See e.g.*, City of Vernon v. Southern California Edison, 955 F.2d 1361, 1365 (9th Cir. 1992); Jones v. Wadsworth, 791 P.2d 1013, 1015 (Alaska 1990).

Illustrative of the present conflict is that, despite the district court's evidentiary finding that the employer had never tendered a contract to teacher at any point during the 71 days after the state court ordered reinstatement, the district court still felt bound by Celotex, to analyze the key fact of non-tender of a contract in negative inference terms as follows:

> "The only evidence to support the allegation that ASD had no contract with McGinnis is that a contract was not available at the high school when Karen [a personnel department employee] said it would be. This is some evidence from which an inference could be drawn, but it is too little in light of the other evidence to be credited (i.e., the state court ordered that McGinnis be reinstated and the correspondence between ASD and McGinnis all indicates that she had [asked the employer to provide (*see*, App. E, *infra*,

> 17a)] a contract). In short, McGinnis' argument that she was told she was reinstated but really was not is too implausible to rest on such a slender reed."
>
> (App. E, *infra*, 23a).

Where a non-occurrence such as "non-reinstatement" gives rise to a cause of action, the Ninth Circuit's inferences are against the non-moving party, and in direct conflict with settled precedent of, in who's favor, inference must be drawn on motion for summary judgment. Under the Ninth Circuit's current view that, "[t]he moving party need not present evidence" (App. E, *infra*, 39a), the outcome in non-reinstatement cases is a foregone conclusion. From the outset under this test, inference is against the complainant's allegation of non-reinstatement and the moving party merely has to deny the allegation, without offering any proof, in order to receive summary judgment in its favor.

III. *De novo* review is denied *ipso facto* when a court of appeals affirms summary judgments on briefs and solely "for the reasons stated by the district court in its orders": A narrow, definitive rule is warranted.

Constitutional due process mandates a fair hearing of the merits of an appeal. *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57, 61-62, 93 S.Ct. 80, 83-84 (1972). Summary judgment has denied a jury trial on the merits of the causes of action, so the strict *de novo* level of scrutiny is required of appeals from summary judgment. *See*, City of Vernon v. Southern California Edison, supra, at 1365. *De novo*, literally and in practice, means consideration anew of the entire matter. *See, e.g.*, United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988). The court of appeals is bound to arrive at its decision **independent of** any inference reached and **independent of the analysis** or the decision of the district court. Id. at 576.

Below, summary judgments on fifteen causes of action involving four defendants were affirmed by the court of appeals without remark except "for the reasons stated by the district court in its orders" (App. A, *infra*, 3a). Four separate judgments below compelled four separate sets of briefs on appeal (approximately 500 pages including the excerpts of the record). Therein, a total of twenty-eight reversible, legal errors, were shown. On the eve of hearing, teacher's counsel took ill and notified the court of his illness and inability to attend oral argument. Thirteen days later the court of appeals rendered its one sentence decision (App. A, *infra*, 1a-3a). Subsequently, the court of appeals denied a timely filed request for rehearing (App. B, *infra*, 4a-6a).

Has independent review occurred? "[F]or the reasons stated by the district court in its orders" is dependent upon the district court's inferences and analysis. The decision indicates that the court of appeals looked at the orders below, and nothing more.

Teacher proffers that a narrow, definitive rule is needed to guide courts of appeal, in cases where *de novo* is the standard of review, to demonstrate an independent review and independent analysis of the matters appealed. The alternative, as shown herein, is a "rubber-stamp" function of the court of appeals that denies due process to a fair review and thus a fair hearing on the merits.

IV. Guidance is needed by the Ninth Circuit as to the criteria to be used to evaluate the merit of appeals, for the purpose of sanctioning appellants, that rely upon state law and upon the state's highest court's interpretation of that law to show the appeal has merit.

The Ninth Circuit's levy of sanctions below demonstrates the Ninth Circuit's flawed criterion for invoking Federal Rules of Appellate Procedure, Rule 38, in appeals that arise under state law precedent. In its one, and only, remark on Alaska precedent the court of appeals in its Order On Sanctions announced a conclusion

that is opposite the holding of the case it cited.

> "Alaska law..., provided McGinnis [teacher] with the pre-termination right to a hearing, because 'termination is not effective until at least fifteen days following the notification of dismissal'."
>
> (App. D, *infra*, 13a, *quoting*, Kenai Peninsula Borough Bd. Of Educ. v. Brown, supra, at 1037).

The court of appeal's quote is dicta that the Alaska Supreme Court rejected in its holding in Brown, as stated on the very next page, after its analysis of due process requirements.

> "Applying the above procedural analysis to Brown's dismissal, we find that the May 3 meeting **resulted in a dismissal prior to a hearing in violation of Brown's due process rights**."
>
> Id. at 1038 (emphasis added).

There is only one difference between the dismissal in Brown, and the dismissal of this teacher: Mr. Brown was told **in-person** that he "had been terminated" and had 15 days to request a hearing; whereas, this teacher was told ***in writing*** that she "had been terminated" and had 15 days to request a hearing. When it told teacher "you have been terminated" (App. H, *infra*, 63a) the employer had allowed 76 days to lapse without complying with the state court's reinstatement order, and it offered the 15 day period to appeal its termination decision that the Alaska Supreme Court had rejected in Mr. Brown's case. The Brown, precedent is squarely, directly on-point.

There is a real question of whether the court of appeals read precedent at all, or instead *merely copied* the district court's views and its identical quote from Brown (*compare*, App. D, *infra*, 12a, and App. E, *infra*, 30a). Teacher was not only denied benefit of *stare decisis* of state law precedent by the court of appeals, she was sanctioned under present Ninth Circuit criterion for

determining when Federal Rules of Appellate Procedure, Rule 38 sanctions may be levied (App. D, *infra*, 11a-13a).

The only way to show that merit exists for appeals from summary judgments is to show that the causes of action were meritorious because they were warranted under state or federal law, and that they were incorrectly adjudicated below despite the existence of merit. Teacher made that showing as to each one of the four defendants in her briefs of twenty-eight specific legal errors of the district court. Teacher renewed that showing in summary format by submitting a concise 33 page brief, pinpoint citing to law and fact showing merit in her case and the appeal as to each of the four defendants, filed in response to the court of appeals' order (*compare*, App. I, *infra*, 64a-67a (cover and table of contents), and App. C, *infra*, 7a-9a).

The court of appeals characterized teacher's showing of merit to it as follows:

> "No attempt is made to justify any of the other complaints, including the one to the effect that the Anchorage School district failed to offer McGinnis a contract of reinstatement (therefore, there was nothing to terminate)."
>
> (App. D, *infra*, 12a).

The merit of teacher's state law claims included a showing of an attorney's negligence *per se* upon his affidavit testimony to the district court that he "abandoned" (App. J, *infra*, 70a) pending litigation he had commenced on teacher's behalf. The attorney disputed only the amount due, claiming it was $27; whereas, as shown by teacher's briefs if calculated pursuant to Alaska law the amount due exceeds $30,000. Another example of the merit shown under state law claims is the appeal from the district court's error and inconsistent application of Alaska's "discovery rule." The court dismissed as time barred the cause of action for the employer's admitted withholding/conversion of $2,700 of teacher's back pay (*see*, App. E, *infra*, 29a) after the state court had ordered

the employer to reinstate teacher. But, in the preceding paragraph, on the identical facts showing the employer's misrepresentations to the effect that it would reinstate teacher, the court had just determined that, "McGinnis could not have known she was injured by any misrepresentations until her employment was terminated [for the second time]" (App. E, *infra*, 29a, emphasis added).

Where state law claims are part of the summarily adjudicated causes of action on appeal, the Ninth Circuit's criterion prior to levying sanctions under Rule 38, presently lacks any requirement upon the court to demonstrate where or how the appeals deviate from the outcomes required pursuant to a state's highest court's interpretation of relevant state law and upon which the appeals rely for their basis. The Ninth Circuit demonstrated at bar, reliance upon a *we don't know but whatever the district court said is okay with us* criterion that fails the parties, the judicial system, and fails miserably the very precept of justice under law.

V. Either confusion regarding precedent or a deliberate refusal to follow precedent is shown by the Ninth Circuit's decisions that are directly counter to the outcome required by precedents of the highest court of the State and precedent of the Supreme Court of the United States.

Loudermill, clearly stands for the proposition that a government employer may not act to terminate a vested property interest in public employment without first giving the employee an opportunity for a pretermination hearing. *See*, Cleveland Board of Education v. Loudermill, supra, at 532, 545-546. It follows that the employer's offer of a hearing after it has told the employee he/she ***has been*** terminated cannot be pretermination, because the hearing comes after "a meaningful opportunity to invoke the discretion of the decisionmaker" has passed. *See*, Id. at 543.

Precedent interpreting Alaska's statute governing

termination of tenured university professors is in-line with the pretermination process required by Loudermill. *See*, Odum v. University of Alaska, Anchorage, 845 P.2d 432 (Alaska 1993). The court in Odum, opined that the procedural protections of Alaska's statute "are most important before termination." Id. at 435. Further, "[a] post-termination hearing which complies with the requirements of the [Alaska statute] does not cure the failure of a pre-termination hearing to comply with the [Alaska statute]." Id.

If a flawed pretermination hearing cannot be cured by a post-termination hearing, then a dismissal without a pretermination hearing at all surely cannot be cured by merely offering opportunity to appeal the employer's termination action by requesting a hearing before the school board. The Alaska Supreme Court's decision in Brown,[4] even though it pre-dates Loudermill, supports the conclusion that a pretermination hearing, at a meaningful time, must also be given Alaska's school teachers under AS 14.20.180.

The Ninth Circuit's opposite conclusion denies this teacher, and other Alaska school teachers, the benefits of *stare decisis*.

CONCLUSION

This petition for a writ of certiorari merits your grant of review.

Respectfully submitted,
Sherry L. McGinnis
Counsel of Record, *Pro se*
3802 Rosecrans Street #131
San Diego, CA 92110
(619) 291-3421

---

[4] Kenai Peninsula Borough Bd. Of Educ. v. Brown, supra, at 1034, 1038.

Appendix A

FILED
Dec 21 1998
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT, Defendant-Appellee.	)	No. 97-35638 D.C. No. CV-94-00385-JWS
SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT; JOHN PATTERSON; CHANCY CROFT, Defendants, and ANCHORAGE EDUCATION ASSOCIATION, Defendant-Appellee.	)	No. 97-35829 D.C. No. CV-94-00385-JWS
SHERRY McGINNIS,	)	No. 97-36030

Plaintiff-Appellant,	)	D.C. No. CV-94-00385-JWS
	)	
v.	)	
	)	
ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; CHANCY CROFT; Defendants, and	)	
	)	
JOHN PATTERSON Defendant-Appellee	)	
	)	
SHERRY McGINNIS, Plaintiff-Appellant,	)	No. 97-35297 D.C: No. CV-94-00385-JWS/AHB
v.	)	
	)	MEMORANDUM*
ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; JOHN PATTERSON Defendants, and CHANCY CROFT, Defendant-Appellee.	)	

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeals from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Submitted December 8, 1998**
Seattle, Washington

Before: REAVLEY,***GRABER, and McKEOWN, Circuit Judges.

The judgment is affirmed for the reasons stated by the district court in its orders of July 5, 1996, April 4, 1997, April 10, 1997, and May 27, 1997,and in the light of the stipulations and orders of June 27, 1997, and October 31, 1997.

Pursuant to Fed.R. App. P. 38, counsel for appellant is directed to submit to this court a written response, to be filed within fifteen days of the date of this memorandum, showing cause why he should not be ordered to pay damages and costs for filing a frivolous appeal and, further, why he should not be ordered to pay the expenses incurred by appellees due to travel and presentation in Seattle for oral argument in this case while he failed to appear or give sufficient notice to counsel that he would fail to do so.

AFFIRMED.

**Upon appellant's failure to appear, the court unanimously determined that the case was suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

***Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

Appendix B

FILED
Feb 12 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT, Defendant-Appellee.	)	No. 97-35638 D.C. No. CV-94-00385-JWS
SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT; JOHN PATTERSON; CHANCY CROFT, Defendants, and ANCHORAGE EDUCATION ASSOCIATION, Defendant-Appellee.	)	No. 97-35829 D.C. No. CV-94-00385-JWS

SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; CHANCY CROFT, Defendants, and JOHN PATTERSON, Defendant-Appellee.	)	No. 97-36030 D.C. No. CV-94-00385-JWS
SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; JOHN PATTERSON Defendants, and CHANCY CROFT, Defendant-Appellee.	)	No. 97-35297 D.C. No. CV-94-00385-JWS/AHB ORDER

Before: REAVLEY,[1] GRABER, and McKEOWN, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Graber and McKeown have voted to reject the suggestion for rehearing en banc, and Judge Reavley has so recommended.

The full court has been advised on the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

---

[1] Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

Appendix C

FILED
Jan 27 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT, Defendant-Appellee.	)	No. 97-35638 D.C. No. CV-94-00385-JWS
SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT; JOHN PATTERSON; CHANCY CROFT, Defendants, and ANCHORAGE EDUCATION ASSOCIATION, Defendant-Appellee.	)	No. 97-35829 D.C. No. CV-94-00385-JWS

SHERRY McGINNIS, Plaintiff-Appellant,	)	No. 97-36030
	)	D.C. No. CV-94-00385-JWS
v.	)	
ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; CHANCY CROFT, Defendants, and	)	
JOHN PATTERSON,	)	
SHERRY McGINNIS, Plaintiff-Appellant,	)	No. 97-35297
	)	D.C. No. CV-94-00385-JWS/AHB
v.	)	
	)	ORDER
ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; JOHN PATTERSON, Defendants, and	)	
CHANCY CROFT, Defendant-Appellee.	)	

Before: REAVLEY,[1] GRABER, and MCKEOWN, Circuit Judges.

Plaintiff-appellant's counsel, within ten days of the date of this order, shall:

1. Provide to the court proof that counsel had planned to attend oral argument, before taking ill, such as evidence of airline or hotel reservations.

2. Show cause why plaintiff should not be held responsible for fees pursuant to Fed. R. App. P. 38, in the event that the court determines that the appeal was frivolous.

---

[1] The Honorable Thomas M. Reavely, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

Appendix D

FILED
Feb 12 1999
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT, Defendant-Appellee.	)	No. 97-35638 D.C. No. CV-94-00385-JWS
SHERRY McGINNIS, Plaintiff-Appellant, v. ANCHORAGE SCHOOL DISTRICT; JOHN PATTERSON; CHANCY CROFT, Defendants, and ANCHORAGE EDUCATION ASSOCIATION, Defendant-Appellee.	)	No. 97-35829 D.C. No. CV-94-00385-JWS

SHERRY McGINNIS,	)	No. 97-36030
Plaintiff-Appellant,	)	D.C. No. CV-94-00385-JWS
	)	
v.	)	
	)	
ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; CHANCY CROFT,	)	
Defendants, and	)	
	)	
JOHN PATTERSON,	)	
	)	
	)	
SHERRY McGINNIS,	)	No. 97-35297
Plaintiff-Appellant,	)	D.C. No. CV-94-00385-JWS/AHB
	)	
v.	)	
	)	ORDER
ANCHORAGE SCHOOL DISTRICT; ANCHORAGE EDUCATION ASSOCIATION; JOHN PATTERSON	)	
Defendants, and	)	
	)	
CHANCY CROFT,	)	
Defendant-Appellee.	)	
	)	

Before: REAVLEY,[1] GRABER, and McKEOWN, Circuit Judges.

Order on Sanctions

In the prior judgment of this court the appellant was directed to show cause why damages should not be awarded to appellees because of the frivolous appeal. Appellant has responded saying that constitutional due process was denied Sherry McGinnis because of the lack of a pre-termination hearing. No attempt is made to justify any of the other complaints, including the one to the effect that Anchorage School District failed to offer McGinnis a contract of reinstatement (therefore, there was nothing to terminate).

Assuming that McGinnis had a contract despite her refusal to go to the personnel office an conclude a contract, Alaska law and the School District provided McGinnis with the pre-termination right to a hearing, because "termination is not effective until at least fifteen days following the notification of dismissal. If the teacher does not request a hearing, the dismissal becomes effective immediately following the expiration of the fifteen day period." Kenai Peninsula Borough Bd. of Educ. v. Brown, 691 P.2d 1034, 1037 (Alaska 1984).

McGinnis was notified of her right to this hearing concerning her termination but failed to respond or take advantage of the hearing opportunity. She recognized in her argument against prescriptive bar of the action that she was not officially terminated until 15 days after the termination notice.

Finding no arguable merit in any of the multiple claims against all of these defendants and no justification for the appeals to this court, the court will award against the appellant and her counsel the sum of all reasonable an necessary fees and costs

---

[1] Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

expended by all appellees in the course of defending the appeals.

Counsel for appellees are directed to file with the court by February 26, 1999, a statement of the full amount of reasonable fees and expenses incurred by the appellees in defense of the appeal of these causes.

Appendix E

FILED
Jul 05 1996
United States District Court
U.S District of Alaska

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

SHERRY McGINNIS, Plaintiff, vs. ANCHORAGE SCHOOL DISTRICT, ANCHORAGE EDUCATION ASSOCIATION, and CHANCY CROFT, JOHN PATTERSON, as individuals Defendants.	) Case No. A94 - 385 CV (JWS))) ORDER FROM CHAMBERS)) (Motions for Summary) Judgment - Dockets 80, 85,) 104; Motions to Strike -) Dockets 121, 127, 139, &) 153; Motion to Dismiss and) Alternative Motion to) Compel - Docket 147;) Application for Substitution) of Counsel - Docket 174;) Amendment of Planning) and Scheduling Order

I. MOTIONS PENDING AND OTHER MATTERS ADDRESSED

AT Docket 80, defendant Anchorage Education Association ("AEA") moves for summary judgment dismissing all claims brought by plaintiff Sherry L. McGinnis against AEA. At Docket 85, defendant Anchorage School District ("ASD") moves for summary judgment dismissing all claims brought by McGinnis against ASD. At Docket 104, defendant attorney John patterson moves for summary judgment dismissing all claims brought by McGinnis against him. These issues have been fully briefed. No

party has requested oral argument, and it would not be of material aid to the court.

At Docket 121, McGinnis objects to evidence and moves to strike exhibits Patterson has submitted to support his summary judgment motion. At Docket 127, McGinnis moves to strike exhibits submitted by AEA and ASD to support their summary judgment motions. Defendants have relied on those materials but have not specifically opposed these motions. At Docket 139, Patterson objects to and moves to strike Exhibits 101 through 109. This motion has been fully briefed but is moot.

At Docket 147 defendant Chancy Croft moves to dismiss McGinnis' complaint against him for failure to prosecute and in the alternative to compel discovery. At Docket 153, McGinnis moves to strike Croft's motion to dismiss and Croft's request for discovery as untimely under the existing planning and scheduling Order.

At Docket 174, Steven C. Finely asks to appear pro hac vice for McGinnis without association of local counsel. This request has been opposed. The disposition of the preceding matters has caused the court to conclude that modifications to the planning and scheduling order are required The necessary modifications are set out below.

II. FACTS

A. BACKGROUND

On August 25, 1994, McGinnis filed a complaint in this court against ASD, AEA, Croft and Patterson.[1] The complaint alleges that McGinnis suffered an accident on ASD premises while engaged in duties related to her job as a high school teacher for ASD. Although injuries to her spine required major surgery, ASD would not accommodate her disability, refused to pay for her surgery, and wrongfully terminated her employment in April, 1989.

In August, 1989, AEA retained and employed Patterson to

---

[1] Jurisdiction is based on diversity of citizenship. 28 U.S.C. §1332.

represent McGinnis. Patterson filed a complaint against ASD in state court, alleging wrongful termination and seeking: (1) a declaration that ASD's notice of termination was ineffectual, that McGinnis did not impermissibly fail to seek an administrative hearing and that ASD should provide her with a hearing; (2) an order that ASD breached its contract with McGinnis; and (3) an order that ASD's breach of agreement was wrongful and violative of public policy and a wrongful interference with her employment contract; and (4) an award of damages in excess of $35,000.

Meanwhile, McGinnis moved to California to attend law school. According to McGinnis, although Patterson initially advocated the egregiousness of ASD's conduct toward her, when he became aware that McGinnis had moved to California to pursue a new profession, he stopped communicating with her, stopped pursuing her lawsuit against ASD, and threatened to cease further prosecution of her claims unless she accepted a proposed settlement offer that she found unacceptable. More specifically, the December 10, 1990, letter to which McGinnis refers in support of this allegation discusses the proposed stipulation between ASD and McGinnis and informs her that it accomplishes more than she could accomplish in court, because it allows her to be on leave without pay for an indefinite period of time. In the letter, Patterson informs McGinnis that he cannot pursue her claim that ASD was withholding money, because that claim has nothing to do with her present lawsuit, which is designed to reinstate her as a teacher in the district. The letter advises McGinnis that her position with respect to negotiations jeopardizes the lawsuit and comprises him, and that he told AEA he would move to withdraw as her attorney if she did not accept the settlement.

McGinnis became concerned about the status of her lawsuit and hired attorney Andrew Hemenway. Hemenway discovered that on January 6, 1992, the court issued a notice and order for dismissal for lack of prosecution. According to McGinnis,

Hemenway had to contact Patterson to "jolt" him into continuing pursuit of her case. Patterson ultimately took ation to prevent dismissal, arguing to the court that the parties were in settlement negotiaitons and that ASD must respond to or oppose McGinnis' summary judgment motion. On June 16, 1992, after concluding that ASD had wrongfully terminated McGinnis, the court granted summary judgment and ordered reinstatement with no break in service.

On July 8, 1992, McGinnis wrote to Patterson, stating that she was making arrangements to return to Alaska from California to resume her teaching position in August of that year, and asking what was required to reinstate her assignment. Patterson advised her to contact ASD's personnel office. He told her he would not represent her beyond the point of achieving her reinstatement, that reinstatement had been accomplished, and that whether she is actually reinstated was in her hands. On July 27, 1992, McGinnis wrote a letter to Edward Lindquist, ASD's Executive Director of Personnel, stating that she was anxious to resume teaching, and asking for details of her assignment and a copy of her contract. McGinnis wrote to Lindquist against on August 7, 1992, and again on August 20, 1992, discussing her contract. In the August 20, 1992, letter, McGinnis told Lindquist she had received a call from Karen with ASD's personnel department, who told her she had a contract ready to be signed and that the contract and her benefits package would be available at West High School upon her arrival Tuesday morning, August 25, 1992.

McGinnis testified in her deposition that when she reported to West High School, the contract was not there, and Principal Lance Bowie told her to contract ASD officers to get the contract. However, she did not contact anyone or go to the ASD offices, did not remain at West High School and did not attend the scheduled teachers' in-service program. Instead, she left the school premises and never returned. Patterson advised her that she had a contract

with ASD by virtue of the court's order and that even though a written contract had not been tendered to her, she must go back to the school and must contact ASD's personnel department. A few days later, Patterson advised McGinnis it was his understanding that she had a written contract and should return to work as soon as possible. McGinnis never contacted nor met with ASD personnel.

On August 31, 1992, Lindquist informed McGinnis that her employment with ASD had been terminated due to unauthorized absences. The letter states in pertinent part:

> It was reported that you arrived at your assignment at West High School on Tuesday morning, August 25, told the principal you would not work without a signed contract, and you were directed to go to the Personnel Department to take care of the matter.
>
> You have neither come to the Personnel Department nor returned to your assigned location at West High School. Further, you have not contacted any District official during the period of time. Efforts to contact yo have been futile since yo have provided no phone number at which you can be reached. Your conduct in this matter has been clearly unprofessional.
>
> You have now been absent from work for five days without authorization; consequently, in accordance with Alaska Statutes Sec. 14.20.170a(3) and School Board Policy 537.61, you have been terminated. A copy of these provisions is attached.

> You May request a hearing before the School Board concerning your termination, if within 15 days after receipt of this notification, you submit a written request for the hearing according to the procedure which is explained in the attachment to this letter.

(Docket 104; Exh. O) McGinnis did not request a hearing before the School Board. Instead, she filed action in this court, raising the following claims: The first cause of action is against ASD for discrimination in employment. The second cause of action is against ASD for discharge in violation of public policy. The third cause of action is against ASD for misrepresentation of fact to induce relocation for employment purposes. The fourth cause of action is against ASD for breach of the implied covenant of good faith and fair dealing in an employment relationship. The fifth cause of action is against ASD for conversion. The sixth cause of action is against ASD, AEA and Patterson, for intentional misrepresentation of fact. The seventh cause of action is against AEA and Patterson for breach of contract. The eight cause of action is against AEA and patterson for negligence. The ninth cause of action is against Croft for breach of contract. The tenth cause of action is against Croft for intentional misrepresentation of fact. The eleventh cause of action is against Croft for negligence. The twelfth cause of action is against Croft for conversion. The thirteenth cause of action is against ASD, AEA and patterson for conspiracy. The fourteenth cause of action is against ASD and Croft for conspiracy. The fifteenth cause of action is against all defendants for negligent or intentional infliction of emotional distress.

B. Affidavits Submitted

1. Elizabeth O'Leary

From 1987 to 1991, O'Leary was a "Uniserv" Director for

NEA-Alaska, Inc., the state affiliate of NEA for Alaska's local teachers' unions, including AEA. O'Leary reported to NEA-Alaska's Executive Director Robert Manners and to NEA-Alaska's Board of Directors. she was neither supervised nor evaluated by AEA, and her pay checks were drawn upon an account of NEA-Alaska. On June 19, 1989, McGinnis met with O'Leary and told her that ASD had terminated her in April of 1989, and she wanted AEA's assistance to be reinstated. O'Leary explained her options. McGinnis addressed her correspondence with O'Leary in care of NEA-Alaska. On July 27, 1989, O'Leary wrote to Lindquist, stating that McGinnis was wrongfully terminated and is entitled to workers' compensation for an on-the-job injury, and requesting to know whether McGinnis can expect to return to full employment with ASD. NEA-Alaska decided to assist McGinnis and engaged Patterson to represent her. O'Leary denies having participated in any conspiracy against McGinnis.

2. Mark Jones

Mark Jones is also a Uniserv Director, employed by NEA-Alaska, not AEA. Although a principal task of his is to assist AEA and its members, he is neither paid nor supervised by AEA. It was reported to Jones that McGinnis went to West High on August 25, 1992, but left the premises when she discovered that a written contract was not waiting for her in the building. The next day, Patterson informed Jones that McGinnis had left, and Jones advised McGinnis to return to work. When Jones contacted Lindquist to obtain the contract, Lindquist told him a conference would be necessary to discuss McGinnis' absence from her duty station at West High. Jones wrote to McGinnis on August 31, 1992, warning her of the consequences of her actions and advising her to respond to ASD's request for a meeting and then return to work. Jones also wrote to McGinnis on September 3, 1992, alerting her of her rights and the deadline for her to request a hearing. Jones denies ever

having been involved in any conspiracy to injury McGinnis. According to Jones, NEA-Alaska, not AEA, selected and paid Patterson.

III. DISCUSSION

A. Motions to Strike

(omitted section - not appealed or challenged)

B. Summary Judgment Standards

Under Rule 56 (c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

> [T]he plain language of 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party['s] case, an on which that party will bear the burden of proof at trial.

Celotex Corp. V. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2522 (1986). A "scintilla" of evidence is not enough to create a genuine issue of material fact. Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). Nor do "mere allegation and speculation... create a factual dispute for purposes of summary judgment." Nelson v. Pima Community College, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (citing Witherow v. Paff, 52 F.3d 264, 266 (9th Cir. 1995).

C. AEA's Summary Judgment Motion

1. Intentional Misrepresentation, Breach of Contract and Negligence (Claims Six, Seven & Eight)

The complaint alleges that AEA and Patterson ignored their fiduciary duty by misinforming McGinnis regarding her rights to employment with ASD and intentionally seeking to eliminate or reduce their and ASD's exposure to liability by refusing assistance.

AEA argues that no action can lie against it for any misrepresentations attributed to O'Leary, Jones or Patterson, or for breach of contract or negligence attributed to Patterson, because they are not AEA employees or agents. With respect to O'Leary's alleged misrepresentation, AEA points out that the only false statement McGinnis attributes to O'Leary is the statement she made in 1989, that McGinnis had no remedies at law, and no injury resulted from that statement because McGinnis did not rely upon it. AEA further asserts that there is no evidence that t Jones or Patterson made any false representations, and that McGinnis disregarded their advice when she refused to tender the requested services at West High or to go to ASD headquarters to inquire about her contract. AEA argues that McGinnis' claim for breach of contract fails because NEA-Alaska, not AEA, makes all decisions about legal services to a dismissed employee, NEA-Alaska hired Patterson, who acted competently and secured full reinstatement, and McGinnis failed to follow Patterson's advice and to appeal her termination in 1992 to the school board. AEA contends that, for the same reasons, it cannot be held liable for negligently hiring Patterson, because there is no evidence that the selection was imprudent, and AEA cannot be held liable for negligently supervising Patterson, because it had no duty to do so.

McGinnis argues that by accepting her union dues, sending letters on his letterhead on her behalf, and exercising control over processing and manner of pursuit of her claims against ASD, AEA

undertook a duty of care to hire competent counsel. McGinnis contends that AEA should have fired Patterson and hired other counsel when he threatened to withdraw in an effort to coerce her to accept an inadequate settlement with ASD, failed to act diligently in pursing her case, failed to secure the contract effectuating reinstatement of her employment, and refused to pursue damages against ASD, even though he had alleged them on her behalf in the complaint.

In its answer to the complaint, AEA acknowledges that it provided McGinnis assistance in connection with her action and admits that it offered to obtain assistance for McGinnis in her dispute with ASD. AEA also admits that it contacted Patterson for consultation and invited him to represent her in litigation against ASD in connection with her employment and alleged breach of contract, and that tit paid Patterson's fees. AEA also admits that in choosing Patterson, it had a duty of due care, but alleges that it fulfilled this duty.

AEA is correct that there is no evidence of any false representations which harmed McGinnis, by any agent of AEA (including O'Leary, Jones and Patterson, who for the sake of discussion here, are assumed to be AEA agents). The only evidence to support the allegation that ASD had no contract with McGinnis is that a contract was not available at the high school when Karen said it would be. This is some evidence from which an inference could be drawn, but it is too little in light of the other evidence to be credited (i.e., the state court ordered that McGinnis be reinstated and the correspondence between ASD and McGinnis all indicates that she had a contract). In short, McGinnis' argument that she was told she was reinstated but really was not is too implausible to rest on such a slender reed. Therefore, claim six must be dismissed. With respect to AEA's obligation to McGinnis in hiring Patterson, there is no evidence to support a claim that AEA breached its contract with McGinnis or was negligent in

selecting, supervising, or failing to fire Patterson. Even if Patterson told AEA he would withdraw if McGinnis refused to accept the settlement, there is no evidence that the proposed settlement was unreasonable or that it did not resolve those issues Patterson was hired to resolve. Thus, claim seven and eight must also be dismissed.

2. Conspiracy between ASD, AEA and Patterson (Claim Thirteen)

AEA argues that there is no evidence of a conspiracy, because McGinnis has no knowledge as to when alleged conspiracy began, as to any overt act that was performed in furtherance of it, or as to what steps AEA should have taken after she won her lawsuit and was reinstated. McGinnis presents no argument in opposition to this assertion, nor does the record contain evidence supporting a conspiracy claim against AEA. Consequently, the thirteenth cause of action must be dismissed.

3. Emotional Distress (Claim Fifteen)

The complaint alleges that all defendants knew or should have known that McGinnis' spinal injuries diminished her physical and mental capability and that her physical and emotional conditions were weakened, rendering her more vulnerable to abuse by defendants. in her negligence claim against AEA, Mcginnis alleges that as a result of AEA and Patterson's failure to utilize the requisite degree of care on her behalf, she "has suffered and continues to suffer severe emotional injury, manifest by irritability, loss of sleep, increased frequency in number and intensity of headaches, upset stomachs and other emotionally related physical symptoms."

AEA argues that the evidence does not support McGinnis' claims for negligent or intentional infliction of emotional distress, because McGinnis agrees that no AEA officer or employee of AEA had personal hostility towards her. McGinnis does not respond to this argument, although her affidavit states that she has "continuing

illness including headaches, stomach disorders, problems sleeping, and anxiety and depression which are directly related to acts and omissions of ASD and the other Defendants . . ." (Docket 128; McGinnis affidavit).

"Whenever a defendant stands in a contractual or fiduciary relationship with the plaintiff and the nature of this relationship imposes on the defendant a duty to refrain from conduct that would foreseeably result in emotional harm to the plaintiff, the plaintiff need not establish a physical injury in order to recover for the negligent infliction of emotional distress."Chizmar v. Mackie, 896 P.2d 196, 203 (Alaska 1995) (citing Hancock v. Northcutt, 808 P.2d 251, 257 (Alaska 1991). This rule appl[i]es only to relationships that are "highly personal and leaden with emotion,' such as "contracts to marry, to conduct a funeral, to sell a sealed casket, to conduct a cesarean birth, to surgically rebuild a nose, to provide promised maternity medical coverage, to provide medical services, and to keep a daughter informed of her mother's health." Hancock, 808 P.2d at 258-59 (footnote omitted). The relationship between AEA and McGinnis was not the type of relationship contemplated by Hancock or Chizmar.

With respect to alleged intentional infliction of emotional distress: [O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. . . . Croft v. Wicker, 737 P.2d 789, 792 (Alaska 1987) (quoting Restatement (Second) of Torts § 46 (1) (1965). The elements necessary to support a prima facie cause of action for IIED were set forth in Teamsters Local 959 v. Wells, 749 P.2d 349, 357 (Alaska 1988): "(1) the conduct is extreme and outrageous, (20) the conduct is intentional or reckless, (3) the conduct causes emotional distress and (4) the distress is severe." See also Cameron v. Beard, 864 P.2d 538, 548 (Alaska 1993). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in

degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Oaksmith v. Brusich, 774 P.2d 191, 200 (Alaska 1989) (quoting Restatement (Second) of Torts § 46 cmt. d (1964)).

If reasonable jurors could differ as to whether the evidence adduced at trial would satisfy these elements, the superior court is required to submit the IIED claim to the jury. Teamsters, 749 P.2d at 357-58. However, as a threshold matter, the court must determine "whether the severity of the emotional distress and the conduct of the offending party warrant an instruction on intentional infliction of emotional distress." Id. at 357; Richardson v. Fairbanks N. Star Borough, 705 P.2d 454, 456 (Alaska 1985). Chizmar, 896 P.2d at 208-09. Here, there is no evidence and, thus, no reasonable jury could fined, that AEA's conduct was extreme and outrageous, intentional or reckless. Claim fifteen must be dismissed.

D. Patterson's Summary Judgment Motion

1. Intentional Misrepresentation (Claim Six)

McGinnis testified that Patterson misrepresented that she would be given her job back if she contacted ASD and made arrangements, and he informed her that she had a contract when he knew she did not. However, McGinnis admits she did not follow Patterson's instruction to contact ASD's personnel office to arrange to sign the contract, and she offers no evidence that if she had followed Patterson's instruction, she would not have been reinstated. Given that the state court ordered reinstatement, and given that all correspondence between McGinnis and ASD indicated that McGinnis had a contract, the evidence does not support McGinnis' assertion that Patterson knew she had no contract. Nor is there evidence that if McGinnis had followed Patterson's advice, she would still have been terminated. Therefore, McGinnis has not established that any alleged

misrepresentation caused any injury, and claim six must be dismissed.

2. Breach of Contract and Negligence (Claims Seven & Eight)

McGinnis alleges that Patterson breached his contractual duties and was negligent when he ceased pursuit of her case, failed to ensure that she was reinstated, failed to seek compensation for her employment and all benefits appurtenant, failed to seek reimbursement for civil contract and tort damages he alleged in the complaint, and failed to recover the $2,000 in wages by his "derelict instruction" to not cash certain checks ASD had sent her.

Patterson argues that he did not breach his contract and was not negligent, because he obtained summary judgment ordering ASD to reinstate her, and because the evidence establishes that the only reason she was not reinstated was because she refused to contact and cooperate with ASD to arrange to sign her contract. Patterson states that he never agreed to pursue contract or tort damages for McGinnis, nor is there evidence that McGinnis suffered any monetary damages as a result of the 1989 termination, nor is there legal authority supporting the proposition that an attorney's drafting of allegations in a complaint constitutes an agreement that he or she will do a particular thing or accomplish a particular result. According to Patterson, the prayer for damages in excess of $35,000 was a necessary demand to satisfy the then-applicable jurisdictional amount in controversy requirement for bringing an action in the state superior court, and McGinnis has provided no evidence that she has suffered monetary damages as a result of the 1989 termination.

There is no evidence to support McGinnis' claim that Patterson breached his contract or was negligent with respect to the reinstatement once it was ordered by the superior court. Nor is there evidence that McGinnis is entitled to monetary tort and contract damages which Patterson failed to obtain. However, it

remains a disputed question of material fact whether Patterson breached his duties owned McGinnis when he temporarily ceased pursuit of the case, causing McGinnis to suffer monetary damages in the amount she paid to retain Hemenway. Claims seven and eight thus remain but are limited to the question presented above.

3. Conspiracy between ASD, AEA and Patterson (Claim Thirteen)

Patterson argues that there is no evidence of a conspiracy between him, ASD and AEA. McGinnis suggests that a jury could reasonably infer that after she moved to California to start a new profession, ASD, AEA, Patterson and Croft conspired to avoid further animosity among their peer group to avoid reemploying a dedicated teacher who had upset high level school administrators by exposing misconduct of ASD personnel through grievance process, and to avoid future difficulties. Patterson's roll in this conspiracy would have been to withdraw effective assistance of counsel and to stop pursuing McGinnis' case, possibly in exchange for money. Because there is no evidence to support this theory, claim thirteen must be dismissed.

4. Infliction of Emotional Distress (Claim Fifteen)

Patterson argues that there is no evidence to support the claim for emotional distress. The court agrees. Claim fifteen is dismissed with respect to Patterson.

E. ASD's Summary Judgment Motion

1. Statute of Limitations (Claims One, Two, Three, Five, Six, and Fifteen)

ASD argues that the statute of limitations bars claims one, two, three, five, six, and fifteen because, with the exception of the August 31, 1992 termination letter, all actions giving rise to those claims occurred long before two years preceding August 25, 1994, the date the complaint was filed. McGinnis argues that she did not discover the injury until she was officially terminated, which would

have been 15 days after the termination letter.

Most of Mcginnis' claims are not barred by the statute of limitations because, under the facts alleged in the complaint, she did not discover the alleged discrimination or misrepresentations of fact until August 25, 1992, when she arrived at the school to find no written contract. Claim one, which alleges employment discrimination, is partially based on the alleged denial of access to employment in 1992. Therefore, claim one remains. Claim two, which alleges discharge in violation of public policy, is based partially on the alleged false representation ASD made to McGinnis that she could continue employment, followed by the denial of access to employment and the ensuing "retermination" Claim two thus remains. Claim three alleges misrepresentation of fact to induce relocation for employment purposes and is based partially on the failure to confirm employment by providing McGinnis a written contract. Viewing the facts as alleged, McGinnis could not have known she was injured by any misrepresentations until her employment was terminated. Thus, claim three remains. Similarly, claim six, which alleges intentional misrepresentation of fact, and claim fifteen, which alleges infliction of emotional distress, appear to include the 1992 termination and, thus, must remain.[3]

Only claim five for conversion is barred by the statute of limitations. McGinnis clearly knew or should have known long before August 25, 1992, that ASD owed her money for teaching services performed before the initial termination in 1989. Claim five is dismissed.

---

[3] In footnote two of its memorandum at Docket 85, ASD joins in and supports AEA's summary judgment motion "to the extent that any claim, issue or ruling has any applicability to the claims against Anchorage School District, such as the sixth, thirteenth and fifteenth causes of action. However, ASD does not provide the court with sufficient information or argument to ascertain whether and how the court's rulings with respect to AEA apply to ASD.

2. Exhaustion of Administrative Remedies (Claims Two, Four & Thirteen)

ASD argues that claims two, four and thirteen are barred by McGinnis' failure to exhaust administrative remedies. McGinnis argues that there was no administrative remedy, because she was never actually reinstated and, thus, was never terminated.

> A tenured teacher's due process rights prior to dismissal are set forth in AS 14.20.180. The Board must notify the teacher of the dismissal and provide "a statement of cause and a complete bill of particulars." The teacher may then request a public or private hearing and other rights, such as representation by counsel and cross-examination, are granted during the hearing. This hearing is to be held prior to an effective dismissal. A pre-termination hearing is consistent with due process and AS 14.20.180.

Kenai Peninsula Borough Bd. of Educ. v. Brown, 691 P.2d 1034, 1036 - 37 (Alaska 1984) (footnote omitted). The tenured teacher may, within 15 days immediately following receipt of the notification [of dismissal or nonretention], notify the employer in writing that a hearing before the school board is requested." AS 14.20.80 (b). "Thus, the termination is not effective until at least fifteen days following the notification of dismissal. If the teacher does not request a hearing, the dismissal becomes effective immediately following the expiration of the fifteen day period." Brown, 691 P.2d at 1037.

"[W]hen grievance procedures are available, an employee must exhaust contractual or administrative remedies before pursuing a direct judicial action against the employer." Pederson-Szafan v. Baily, 837 P.2d 124, 128 (Alaska 1992) (citing Casey v. City of Fairbanks, 670 P.2d 1133, 1136 (Alaska 1983). Beard v.

Baum, 796 P.2d 1344, 1348 (Alaska 1990)). "The requirement that an aggrieved employee exhaust administrative remedies is inapplicable, however, 'where the administrative remedy is inadequate or where the pursuit of the administrative remedy would be futile due to the certainty of an adverse decision.'" Romulus v. Anchorage Sch. Dist., 910 P.2d 610, 615 (Alaska 1996) (quoting Eidelson v. Archer, 645 P.2d 171, 181 (Alaska 1982)).

During her deposition, McGinnis was asked if, after learning she had been terminated on August 31, 1992, she took any steps to request a hearing under Alaska law as a tenured teacher. She responded that she did not, because she believed it would be futile in light of ASD's past conduct. However, there is no evidence to support this statement. See, Romulus, 910 P.2d at 615 ("A grievance process appears futile when the person who ordered the adverse employment decision presides over its appeal"). McGinnis offers no evidence to support her argument that she never was reinstated. In fact, the complaint specifically alleges that ASD terminated her tenured employment. By this, she cannot be referring to the 1989 termination, because the statute of limitations clearly had run with respect to it. Thus, the second, fourth and thirteenth causes of action must be dismissed for failure to exhaust administrative remedies.

3. Conspiracy between ASD and Croft (Claim Fourteen)

Claim fourteen alleges that Croft entered into a secret promise that Croft would not pursue further action against ASD on behalf of McGinnis, depriving her of reimbursement for medical expenses and interest. The complaint states that ASD and Croft "conspired with each other to commit the tortious conduct as alleged and by reason of the conspiracy and concerted efforts by these Defendants and each of them inflicted severe emotional distress upon Plaintiff and deprived Plaintiff of reimbursement for medial expenses and interest and penalty as provided by law"

(Docket 1, pg. 27). ASD argues that the could should dismiss the claim because the Alaska Workers' Compensation Act precludes her from asserting common law tort claims for damages.

AS 23.30.045 contains the provisions regarding the employer's liability for workers' compensation. "The liability of an employer prescribed in AS 23.30.45 is exclusive and in place of all other liability of the employer. . ." AS 23.30.055. "However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death." Id. Furthermore, "[a]n exception to the exclusivity provisions of AS 23.30.055 exists in cases of an employer's, or fellow employee's, intentional torts committed against the employee." Williams v. Mammoth of Alaska, Inc., 890 P.2d 581, 185 (Alaska 1995) (citing Van Biene v. ERA Helicopters, Inc., 779 P.2d 315, 318 (Alaska 1989).

McGinnis seeks redress against ASD for an alleged conspiracy to deny her benefits to which she was entitled. ASD does not challenge the existence of evidence to support claim fourteen, only McGinnis' right to pursue the claim. Because the alleged civil conspiracy to deny benefits is an intentional tort, claim fourteen remains.[6]

4. Emotional Distress (Claim Fifteen)

The fifteenth cause of action alleges negligent or intentional infliction of emotional distress. ASD argues that McGinnis cannot recover for negligent infliction of emotional distress, because her employment contract was not the type of contract which would establish a sufficient preexisting duty, nor was it "highly personal

---

[6] The Court is not making a finding that there is evidence to support this claim. As noted, ASD has not argued any lack of evidence.

and laden with emotion," and because she offers no facts which would establish that she suffered severe or serious emotional distress. Chizmar, 896 P.2d at 203. With respect to the claim of intentional infliction of emotional distress, ASD argues that McGinnis has failed to offer evidence that ASD's conduct was extreme and outrageous, intentional or reckless, and that the distress was severe. Id., 896 P.2d at 208. McGinnis argues that the extent of the injuries is for the jury to decide. Her affidavit sates that she has "continuing illness including headaches, stomach disorders, problems sleeping, and anxiety and depression which are directly related to acts an omissions of ASD and the other Defendants." (Docket 128; McGinnis affidavit). McGinnis argues that ASD's response to the judgment against it ordering her full reinstatement was to escalate its behavior by substantively ignoring the court's order, tricking her into relocating to Alaska from California on its false promise of employment, and engaging in a cover-up attempt.

The court agrees that the present state of the evidence leaves a disputed issue of material fact concerning the extent of the alleged injuries. They may be serious enough to support McGinnis' claims. However, the employment contract does not embody the close relationship required to create a duty whose negligent violation could give rise to a claim for emotional distress. With one exception, taking the evidence in the light most favorable to McGinnis, ASD's alleged conduct cannot be characterized as adequate to support a claim for intentional infliction of emotional distress. The one exception is the claim that ASD agreed with Croft to deny McGinnis' benefits. Consequently, claim fifteen is dismissed with respect to ASD, except for the claim that ASD intentionally deprived McGinnis of benefits.

F. Motions at Dockets 147 and 153

At Docket 147 defendant Croft has moved to dismiss plaintiff's complaint against him for failure to prosecute and in the

alternative to compel discovery. At docket 153 plaintiff has moved to strike Croft's motion to dismiss and Croft's request for discovery as untimely under the existing planning and scheduling order. McGinnis is correct. The motion is untimely and good cause for filing late has not been established. The motion at Docket 147 is hereby stricken and the motion at Docket 153 is granted.

In view of the fact that the court is reopening discovery and motion practice for a limited period for reasons discussed below, it needs to be said that with respect to the request to dismiss for failure to prosecute at Docket 147, the court's examination of the motion showed that is without merit. As to the request to compel discover also contained in the motion at Docket 47, the court's examination of the motion reveals that the request probably has merit (although, of course, McGinnis had no opportunity to oppose the motion, nor the court to consider her opposition). For these reasons, while the reopening of motion practice allows for the filing of a motion seeking the same relief as that sought at Docket 147, Croft may want to rethink the wisdom of filing a motion to dismiss for failure to prosecute. Similarly, McGinnis might be wise to promptly negotiate a stipulation with Croft providing for the necessary discovery, before that issue has to be fully briefed and decided by the court.

G. Application at Docket 174

(omitted section - not appealed or challenged)

H. Amendment to Planning and Scheduling Order

(omitted section - not appealed or challenged)

IV. CONCLUSION

For the reasons set out above, the motion at Docket 80 is

GRANTED. The motion at Docket 85 is **GRANTED** in part and **DENIED** in part as follows: As to ASD, claims two, four, five, and thirteen are dismissed. Claims one, three, six and fifteen remain. However, claim fifteen is limited to the alleged intentional infliction of emotional distress by the denial of benefits. The motion at Docket 104 is **GRANTED** in part and **DENIED** in part as follows: As to Patterson, claims six, thirteen and fifteen are dismissed. Claims seven and eight remain but are limited to the issue of whether Patterson failed to diligently pursue McGinnis' claim and damages are limited to expenses incurred in obtaining counsel to investigate and confront Patterson regarding this alleged failure.

The motions at Dockets 121 and 127 are **DENIED**, and the motion at Docket 139 is **DENIED** as moot. The motion at Docket 147 is **STRICKEN** and the motion at Docket 153 is **GRANTED**. The application at Docket 174 is **GRANTED**, but subject to the conditions discussed above. The planning and scheduling order is **AMENDED** as set out above.

DATED this 3rd day of July 1996 at Anchorage, Alaska.

s/_____
JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

A94-0385--CV (JWS)

J. Josephson
L. Croft
B. Owens (Jermain)
C. Stowers
J. Oakes
S. Finley

FILED
Jul 26 1996
United States District Court
U.S. District of Alaska

MINUTES OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SHERRY L. MCGINNIS v.
ANCHORAGE SCHOOL DISTRICT, et al

THE HONORABLE JOHN W. SEDWICK
CASE NO. A94 - 0385 CV (JWS)
Deputy Clerk Official Recorder
Pam Richter

APPEARANCES: for PLAINTIFF: - - -
for DEFENDANT: - - -

PROCEEDINGS: **ORDER FROM CHAMBERS**

The court has considered the request for reconsideration at docket 180 and finds no merit in the arguments advanced by plaintiff. The motion at docket 180 is DENIED.
DATE: July 26, 1996

ENTERED AT JUDGE'S DIRECTION
INITIALS: prr Deputy Clerk
A94-0385--CV (JWS)

J. JOSEPHSON
L. CROFT
B. OWENS (JERMAIN)
C. STOWERS
S. FINLEY

Appendix E

FILED
April 10 1997
United States District Court
U.S. District of Alaska
By_____Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

SHERRY McGINNIS,	)
Plaintiff,	) Case No. A94 - 385 CV (JWS)
	) ORDER FROM CHAMBERS
vs.	)
	) (Re: Motions for Summary
ANCHORAGE SCHOOL	) Judgment - Docket 210)
DISTRICT, ANCHORAGE	)
EDUCATION	)
ASSOCIATION, and	)
CHANCY CROFT, JOHN	)
PATTERSON, as individuals	)
Defendants.	)
_____	)

I. MOTIONS PENDING

Plaintiff Sherry McGinnis' ("McGinnis") complaint alleged fifteen separate causes of aciton against four defendants. At docket 210, Anchorage School District ("ASD") moves for summary judgment on the remaining claims against ASD: the first cause of action alleging employment discrimination; the third cause of action for misrepresentation of facts to induce relocation for employment; the sixth cause of action for intentional misrepresentation of fact; and the fourteenth cause of action alleging a conspiracy between ASD and defendant Chancy Croft

("Croft"). The motion is opposed.[7] Oral argument has not been requested, and it would not be of material aid to the court.

II. BACKGROUND

In 1988 McGinnis suffered an injury to her back while engaged in duties related to her teaching assignment at Dimond High School in the Anchorage School District. The following year plaintiff was wrongfully discharged from employment. In 1992 the Superior Court of Alaska ordered McGinnis reinstated to employment with no break in service.

McGinnis claims that she was instructed by ASD personnel department that a contract of employment, effectively reinstating her, was ready and would be waiting along with a benefits package at West High School upon her arrival on August 25, 1992. When McGinnis reported to West High School, the contract was not there, and she was instructed to contact the personnel department. Instead of contacting the personnel department, McGinnis left the school premises and never returned. On August 31, 1992, McGinnis was informed that her employment with ASD had been terminated due to unauthorized absences. Two years later, McGinnis filed this action.

III. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.

---

[7]In her Opposition, McGinnis asserts that she is entitled to recover damages suffered prior to "Reinstatement" in August 1992. The judgment in her 1992 state court lawsuit resulted in an order that McGinnis immediately be offered reinstatement with no break in service. Because McGinnis does not seek such damages in her complaint, this court will not address the argument.

Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact. Celotex, 477 U.S. at 323-325.

Once the moving party has met this burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. Id.; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-9 (1986); Adickes, 398 U.S. at 160, n22. The non--moving party may not rest upon mere allegations or denials, but must show that there is sufficient material evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial. Anderson, 477 U.S. at 248. A "scintilla" of evidence is not enough to create a genuine issue of material fact. Anderson, 477 U.S. at 252. Nor do "mere allegations and speculation...create a factual dispute for purposes of summary judgment." Nelson v. Pima Community College, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (citing Witherow v. Paff, 52 F.3d 264, 266 (9th Cir. 1995)).

There is no genuine issue of material fact when the relevant evidence in the record, taken as a whole, indicates that a reasonable fact-finder could not return a verdict for the non-moving party. Anderson, 477 U.S. at 248; Matsushita Elec. Indus. Co. Ltr. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

IV DISCUSSION

A. McGinnis' First, Third, and Sixth Causes of Action

As previously mentioned, in 1992 the Superior Court of Alaska ordered ASD to reinstate McGinnis' employment with no break in service. McGinnis' first, third, and sixth causes of action are all contingent upon a finding that ASD failed to comply with the reinstatement ordered by the court. In her first cause of action, McGinnis alleges that the reinstatement process which occurred in

August 1992 was sham and that ASD discriminated against her based on her work-related injury, subsequent disability, and successful wrongful termination suit against ASD. The third cause of action claims that ASD violated AS 23.10.015 which prohibits an employer from bringing an individual into the state of Alaska to work as an employee by means of false or deceptive representations or false pretenses concerning the character of the work to be done or the amount of compensation to be paid.[9] McGinnis' sixth cause of action alleging intentional misrepresentation of fact asserts that ASD's offer of reinstatement was intentionally misleading, false, fraudulent, and calculated to achieve its wrongful purpose of eliminating or greatly reducing ASD's exposure to liability for its acts, past and contemporary, which wrongfully deprived McGinnis of her tenured employment rights under law.

McGinnis offers as support for her contentions a letter dated June 29, 1992, from J. Edward Lindquist ("Lindquist"), who at the time was ASD's Executive Director, which she claims falsely and fraudulently represented that she would be reinstated to a tenured teaching position with no break in service pursuant tot he state court ruling. Additionally, McGinnis alleges that when she showed up to begin her teaching assignment as instructed on August 25, 1992, at West High School, ASD, among other things, failed to provide her with a written contract of tenured employment.

Lindquist submits by affidavit that there was nothing false nor did he intend to be deceptive or misleading in his letter to

---

[9]AS 23.10.015 provides:

> False representations to procure employees prohibited. A person doing business in this state may not personally or through and agent...bring an individual into his state to work as an employee in this state, by means of false or deceptive representations, false advertising, or false pretenses...concerning the kind and character of work to be done, or the amount and character of the compensation to be paid for the work, or the sanitary or other conditions of employment.

McGinnis. Furthermore, the affidavit of Karen Voss ("Voss"), an employee in ASD's personnel department whom McGinnis claims assured her that her teaching contract would be waiting for her at West High School, denies any agreement to have the teaching contract available for McGinnis at West High School on August 25 and states that such an agreement would be inconsistent with the custom and practice concerning teachers' contracts which are usually kept at the personnel office. Voss also states that there was teaching contract prepared for McGinnis for the 1992-3 school year at the personnel office.

While McGinnis disputes Voss' testimony regarding the custom and practice concerning teachers' contracts, the parties agree that McGinnis arrived at West High School on the morning of August 25, 1992, and left the premises after being informed by West High principal Dr. Lance Bowie ("Bowie") that her teaching contract was not at the school. McGinnis asserts that the absence of a contract constitutes failure by ASD to tender a teaching contract. The uncontroverted facts show otherwise. Principal Bowie suggested that McGinnis go to the personnel office to locate her contract. McGinnis left the school and did not return. Shortly thereafter, McGinnis was advised by her attorney, John Patterson, as well as her Anchorage Education Association representative, Mark Jones, to contact the personnel department. Instead, Mcginnis did not contact the personnel department nor report to West High School. After receiving no further contact from McGinnis, Lindquist wrote a letter dated August 31, 1992, advising that she had been terminated due to unexcused absences and informing her that she may request a hearing before the school board within 15 days after receipt of this letter. McGinnis requested no hearing and did not return to work.

A reasonable fact-finder could not return a verdict in favor of McGinnis based on these undisputed facts. No evidence is offered which establishes the falsity of any material representation

made by any person with ASD, nor is there evidence of any intention of the district to keep McGinnis from returning as a teacher for the 1992-3 school year. At the very most the evidence would support the conclusion that McGinnis was told the contract would be at the high school when it was at the District Personnel Office. Assuming there is a dispute as to this fact, it is simply not material. It is nearly inconceivable that a public agency under court order to re-employ McGinnis would tell her in writing she was being re-employed, while not standing prepared to do so. To support the inference that a public agency would do just that, McGinnis points to her understanding that she was told she could find the contract at Wet High, which proved incorrect. That scintilla of evidence will not support a finding that the contract was not in fact being offered to her in the customary channel at the District Personnel Office.

ASD did not induce McGinnis to return to Alaska, she was informed of her right to reinstatement under state court order. The fact that a teaching contract was not waiting for her at West High School upon her arrival does not rise to the level of false or deceptive representations as required under AS 23.10.015. The affidavits of Bowie and Voss indicate that, at the most, the evidence presented shows a misunderstanding which McGinnis had within her power to clarify and resolve. It is to be noted that McGinnis acted against the advice and direction given to her by her attorney, John Patterson, and her AEA representative, Mark Jones, when she failed to contact the personnel department at the administration building after being instructed that a contract was prepared and failed to request a hearing before the School Board following receipt of Lindquist's letter. ASD is entitled to summary judgment on the first, third, and sixth causes of action because a reasonable fact-finder could not, based on the aforementioned facts, return a verdict in favor of McGinnis.

B. Fourteenth Cause of Action - Conspiracy

McGinnis claims that ASD and croft entered into a "secret promise" that Croft would not pursue the workers' compensation claims for McGinnis after ASD agreed to pay Croft his statutory attorney's fees pursuant to a stipulation which was submitted to and approved by the Alaska Workers' Compensation Board. McGinnis further alleges that she suffered severe emotional distress as a result of the defendants' conspiracy to engage in tortious conduct.

McGinnis fails to submit any specific evidence to show that ASD and Croft agreed with one another to act against her unlawfully or for any unlawful purpose. In fact, McGinnis apparently concedes her fourteenth cause of action by offering no opposition to ASD's motion for summary judgment. As a result, ASD is also entitled to summary judgment on the fourteenth cause of action.

V. CONCLUSION

For the foregoing reasons, ASD's motion for summary judgment at docket 210 is GRANTED.

DATED this 10th day of April 1997 at Anchorage, Alaska.

s/_____

JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE
A94-0385--CV (JWS)

J. Josephson
I. Croft
R. Middleton (Middleton)
B. Owens (Jermain)
C. Stowers
D. Moody

Appendix E

FILED
APR 04 1997
United States District Court
U.S District of Alaska

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

SHERRY McGINNIS,	)
Plaintiff,	) Case No. A94 - 385 CV (JWS)
	) ORDER FROM CHAMBERS
vs.	)
	) [Re: Motions for Partial
ANCHORAGE SCHOOL	) Summary Judgment -
DISTRICT, ANCHORAGE	) Docket Nos. 200, 207, 212]
EDUCATION	)
ASSOCIATION, and	)
CHANCY CROFT, JOHN	)
PATTERSON, as individuals	)
Defendants.	)
	)

I. MOTIONS PRESENTED

Defendant Chancy Croft ("Croft") has filed three motions for partial summary judgment. At docket 200, Croft seeks summary adjudication of the issue of plaintiff Sherry McGinnis' ("McGinnis") entitlement to disability benefits under causes of action 9 and 11 of the Complaint.[1] At docket 207, Croft asks for partial summary judgment on cause of action 14 of the Complaint alleging that Croft and the Anchorage School District ("ASD") conspired to cause McGinnis damage. Finally, at docket 212, Croft

[1]At docket 208, the court granted Croft's motion at docket 200. However, as set forth at docket 226, the order at docket 208 has been vacated. The issues raised at docket 200 will be considered here.

moves for partial summary judgment to dismiss the remaining causes of action against him: the remainder of causes of action 9 (breach of contract) and 11 (negligence), 10 (intentional misrepresentation of fact), 12 (conversion), and 15 (negligent or intentional infliction of emotional distress. The motions are opposed. The parties have not request oral argument, and it would not be of material aid to the court.

II. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact. Celotex, 477 U.S. at 323-325.

Once the moving party has met this burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. Id; Anderson v. Liberty Lobby,Inc., 477 U.S. 242, 248-9 (1986); Adickes, 398 U.S. at 160, n22. The non-moving party may not rest upon mere allegations or denials, but must show that there is sufficient material evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial. Anderson, 477 U.S. at 248. A "scintilla" of evidence is not enough to create a genuine issue of material fact. Anderson, 477 U.S. at 252. Nor do "mere allegations and speculation...create a factual dispute for purposes of summary judgment." Nelson v. Pima Community College, 83 F.3d 1075, 1081, 82 (9th Cir. 1996) (citing Witherow v. Paff, 52 F.3d 264, 266 (9th Cir. 1995)).

There is no genuine issue of material fact when the relevant

evidence in the record, taken as a whole, indicates that a reasonable fact-finder could not return a verdict for the non-moving party. Anderson, 477 U.S. at 248; Matsushita Elec. Induc. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. BACKGROUND

In January 1988, while working as a teacher at Dimond High School, McGinnis fell down and injured her back. In July 1988, McGinnis and Croft entered into a written contract for legal services. A few months later McGinnis had surgery on her back. Approximately one year later in October 1989, Croft obtained the opinion of McGinnis' surgeon, Dr. Mayfield, that the fall was a significant factor in McGinnis' need for treatment. As a result, ASD paid approximately $100,000 for workers' compensation benefits and reimbursement of medical expenses incurred due to McGinnis' on-the-job injury. In March 1990, Croft received payment of $11,000 in attorney's fees from ASD.

In October 1989, Croft filed a claim with the Alaska Workers' Compensation Board ("AWCB") for payment of other workers' compensation benefits, medical expenses, and interest due on the $100,000 previously withheld from McGinnis. On April 6, 1990, AWCB conducted a hearing and in June 1990 issued a decision denying McGinnis payment for additional workers' compensation benefits and interest. AWCB found a small portion of the medical expenses claimed compensable and denied payment for the rest. Croft appealed to the Alaska Superior Court. In October 1991, the Alaska Superior Court affirmed AWCB's decision denying payment for workers' compensation benefits and medical expenses, but reversed and remanded its decision denying interest.

Croft filed additional claims on McGinnis' behalf on April 27, 1990. However, an AWCB hearing scheduled for November 16, 1990, was continued until McGinnis provided an itemized list

to the Board and ASD's counsel of the additional expenses sought for reimbursement. On November 19, 1990, Croft sent McGinnis a letter withdrawing from her AWCB case, although he continued to represent her in the aforementioned appeal. McGinnis failed to furnish ASD counsel an itemized list, and the claim was dismissed in April 1991.

Finally, Croft filed one last claim before AWCB in June 1990 seeking still more workers' compensation benefits and attorney's fees. The pleadings do not reflect that a hearing was ever scheduled before AWCB.

McGinnis file suit against Croft and the other named defendants in August 1994.

IV. DISCUSSION

A. Cause of Action 9 - Breach of Contract

McGinnis' Complaint states in cause of action nine that she contracted with Croft for legal assistance to provide legal services to procure workers' compensation benefits for disability, to seek payment and reimbursement for medical expenses, and to pursue all actions or claims at law or in equity against ASD. Mcginnis alleges that Croft breached their contract by failing to perform his obligations and by withdrawing his legal representation on at least three occasions without just cause or prior notice causing prejudice to plaintiff's legal rights resulting in the loss of economic benefits she was entitled to receive pursuant to the Alaska Workers' Compensation Act ("Act").

1. Disability Benefits

In January 1988, when McGinnis was injured, Alaska compensation law was premised on the "earning capacity" concept. The Act defined "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or nay other employment." AS 23.30.265.10. However, after July 1, 1988, the Act was substantially revised

when Alaska adopted the "whole man" or impairment concept.[3] The earlier version of the Act under which McGinnis sought disability benefits compensated only for lost earnings or lost earning capacity and not for medical impairment. McGinnis asserts that she was entitled to other disability benefits such as permanent partial impairment.

The record establishes that McGinnis was paid disability benefits under the Act from January 7, 1988, the date of her injury, to May 8, 1990, when she was released by her physician to return to work as a school teacher. Since Mcginnis could return to the job she had at the time of her injury, she had no incapacity because of injury to earn the wages which she was receiving at the time of her injury in the same or any other employment. Therefore, under the applicable version of the Act, McGinnis was not entitled to any more disability benefits after May 8, 1990.

McGinnis admits numerous times that she could physically return to teaching after May 1990. In her Complaint she states:

> Plaintiff's physical disability was/is not completely debilitating and with minor accommodations, such as chair padding or cushions, Plaintiff was/is physically able to perform all necessary work related teaching duties.

She makes essentially the same statement in her depositions.

If McGinnis had been injured after July 1, 1988, she might have been entitled to some compensation for permanent partial impairment, however that is not the case. Under the old Act McGinnis was no longer entitled to disability benefits after May 1990. Therefore, Croft performed the contract with regard to

---

[3]The 1988 amendments apply only to injuries sustained on or after July 1, 1988. Ch. 79, § 48, SLA 1988.

disability benefits.[3] Croft is entitled to summary judgment in this portio of the ninth cause of action.

2. Medical Expenses/ Interest / Penalty

In January 1990, ASD rescinded its initial controversion of McGinnis' claim and paid approximately $100,000 for workers' compensation benefits and to reimburse medical expenses. However, there were additional claims pending.

On April 6, 1990, AWCB conducted an all day hearing on McGinnis' claims for reimbursement of medical expenses which had accrued during the pending action to recover the $100,000 and for interest due on the money while withheld.[4] In June 1990, the AWCB issued a decision basically denying, with few minor exceptions, all of the medical expenses requested by McGinnis. The Board also denied interest on the previously paid medical expenses. Mcginnis appealed the decision to the Alaska Superior Court.

Before the Superior Court could render a decision, the Alaska Supreme Court decided Municipality of Anchorage v. Carter, 818 P.2d 661 (Alaska 1991). Both parties stipulated that Carter materially affected the Board's June 1990 decision and agreed to remand the case back to the AWCB. However, after a subsequent withdrawal of the Carter decision by the Sureme Court, the Superior Court vacated the stipulation and on October 14, 1991, affirmed the AWCB's decision regarding the medical expenses, but reversed and remanded the issue on the payment of

---

[3]At docket 230, Croft moves or reconsideration of the court's order at docket 209 and asks for discovery sanctions. Because the court grants Croft's motion dismissing any claims for McGinnis for disability benefits, the motion at docket 230 is denied as moot.

[4] Croft contends that he did not believe McGinnis was entitled to a penalty and that she knew that no claim for a penalty would be advanced at the April 6, 1990, hearing. McGinnis maintains that she is entitled to a penalty. Therefore, there exist material issues of fact regarding McGinnis' entitlement to a penalty.

interest.

In a letter dated November 19, 1990, Croft informed McGinnis that he would no longer represent her before the AWCB, but would continue to handle the aforementioned appeal. Croft's withdrawal letter was sent after McGinnis failed to appear either in person or telephonically despite his having made accommodations for her for the November 16, 1990, AWCB hearing. The hearing had been scheduled because Croft had filed an application requesting payment of additional medical expenses not included in the previous hearing on April 6. Because of McGinnis' failure to appear at the hearing, Croft requested, and AWCB granted, a continuance. In addition, AWCB ordered that within fourteen days McGinnis serve upon the Board and ASD counsel an itemized list of the additional medial and transportation expenses sought. No list was served. Without complying with AWCB's order, McGinnis could not reschedule a hearing. On January 2, 1991, ASD filed a motion to dismiss. The motion went unopposed. After McGinnis failed to appear for the hearing on the motion to dismiss, the AWCB dismissed the application for additional medical expenses in April 1991.

McGinnis claims that Croft breached their contract by withdrawing his legal representation on at least three occasions without just cause or prior notice. As far as the court can tell, aside from Croft's withdrawal in November 1990, he made no other attempts to withdraw.[5] Mcginnis also claims that Croft would not return her files to her which prevented her from stopping a default ruling resulting in loss of monetary reimbursement to which she

---

[5] Croft did send two letters dated March 18, 1991, and April 4, 1991, to McGinnis expressing that, due to the stipulation entered into after Carter, her case had been remanded to AWCB which concluded his services in her workers' compensation claim. However, when Carter was withdrawn by the Alaska Supreme Court, Croft continued to represent McGinnis until the Alaska Superior Court's October 14, 1991, decision remanding her claim for interest to AWCB.

claims she was entitled under the Act. Croft claims that it was McGinnis' own failure to comply with AWCB's order to furnish an itemization of expenses that prevented her recovery.

Whether or not Croft breached the contract for legal services with respect to the recovery of the items discussed in this section of the order depends on whether his withdrawal was effective. The effectiveness of his withdrawal turns upon disputed facts. In his letter of November 19, 1990, Croft asserts that he talked to McGinnis' husband on the morning of the hearing with the intention of contracting McGinnis, who was in California attending law school, to discuss her case. In his affidavit Croft states that he withdrew from representing McGinnis because she refused to talk to him prior to the AWCB hearing on November 16; to furnish any information to him; and to attend the hearing despite his efforts to arrange for her to testify telephonically. On the other hand, in McGinnis' December 1990 letter she claims that she made an effort to contact Croft before the hearing and that his staff would not schedule an appointment. In her affidavit McGinnis states that she never gave her consent to Croft to withdraw as her attorney and that he had all the information necessary to pursue her claims before AWCB. Further, she testifies that Croft refused to provide her with her file upon request. The efficacy of Croft's withdrawal depends on genuine issues of material fact regarding whether Croft breached his contractual obligations to McGinnis to pursue the claims for additional medical expenses, interest, and a penalty.

B. Cause of Action 10 - Intentional Misrepresentation of Fact

McGinnis alleges in her Complaint that on or about April 4, 190, Croft informed McGinnis that ASD had agreed to pay approximately $100,000 and that she was entitled to additional moneys from ASD for reimbursement of medical expense, interest, and penalty. McGinnis claims that she believed Croft and relied upon his representations to her detriment in that she took no further

action to hire another attorney to secure payment for the aforementioned moneys. McGinnis claims that Croft intentionally misrepresented to her that he was pursuing all necessary actions on her behalf to seek to collect reimbursement for medical expenses, interest and penalty from ASD. McGinnis alleges that, although croft represented that he was pursuing actions on her behalf, he was in fact doing nothing and that he hid his secret intention to do nothing further on her behalf. In her affidavit, McGinnis states that Croft did not pursue to conclusion the claims he filed on her behalf.

The Alaska Supreme Court explained in Great Western Sav. Bank. v. George W. Easley Co., J.V., 778 P.2d 569, 580 n. 11 (Alaska 1989), citing Restatement (Second) of Torts § 525 (1977):

> One who fraudulently makes a misrepresentation of fact, opinion, intention of law for the purpose of inducing another to at or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

The Restatement ((Second) of Torts § 526 provides:

> A misrepresentation is fraudulent if the maker
> (a) knows or believes that the matter is not as he represents it to be
> (b) does not have the confidence in the accuracy of his representation that he states or implies, or
> (c) knows that he does not have the basis for his representation that he states or implies.

In the case at bar, McGinnis offers no evidence that Croft knew or believed that on or about April 4, 1990, McGinnis would not be entitled to an additional recovery from ASD. In fact, the evidence supports the contrary. The record reflects that Croft: 1) represented McGinnis before AWCB on April 6, 1990, at an al day hearing; 2) filed, on April 27, 1990, a claim for additional recovery

against ASD; and 3) pursued McGinnis' appeal until a determination was made by the Alaska Superior Court in October 1991. Therefore, McGinnis' claims that Croft misrepresented any fact or intended to do nothing on her behalf after April 4, 1990, are meritless. Croft is entitled to summary judgment on the tenth cause of action.

C. Cause of Action 11 - Negligence

McGinnis asserts that the legal services contract executed by the parties created a duty imposed by law requiring Croft to exercise due care an skill as an attorney to protect McGinnis' legal rights and to act in a reasonable manner to initiate and prosecute any and all claims, causes of action, or remedies which existed pursuant to Alaska's laws in order to redress her injuries. McGinnis argues that had Croft exercised the proper care and skill, free from unannounced and unauthorized withdrawals of legal representation, then her claims would have been timely brought within the applicable statute of limitations.

To the extent that McGinnis is claiming that Croft failed to continue to represent her before AWCB following the November 16, 1990, hearing, McGinnis merely reiterates her breach of contract claim. Alternatively, if the court construes McGinnis' assertion to be that Croft failed to skillfully advocate her claims before AWCB, she has failed to produce the expert testimony necessary under Alaska law in a malpractice action to establish that the defendant violated accepted standards and that defendant's violation damaged plaintiff. Drake v. Wickwire, 795 P.2d 195-96 (Alaska 1990). Croft is entitled to summary judgment on this cause of action (but without prejudice to her breach of contract claim).

C. Cause of Action 12 - Conversion

McGinnis complains that Croft interfered with her right to possession, dominion, and control of $312.30 that she paid him for the purpose of obtaining a copy of the transcript of her workers'

compensation hearing and that Croft has refused to provide her with a copy of the transcript. Further, McGinnis alleges that she later demanded return of the $312.30 after discovering that Croft had withdrawn from representing her.

McGinnis wanted to appeal the Board's June 5, 1990, decision denying any additional medical benefits or interest and Croft agreed to handle her appeal provided that she pay for the filing fee and any transcript costs. croft argues that he advanced both the filing fee and the $312.30 for a copy of the transcript. The transcript was used to prepare McGinnis' appellate brief. Therefore, Croft asserts that the was entitled to be reimbursed.

The money in dispute wa used to reimburse Croft for a transcript he used to draft McGinnis' appellate briefs and argue her case. Thus, McGinnis' claims that Croft interfered with her right to possession and wrongfully dispossessed her of $312.30 are meritless. Croft is entitled to summary judgment on this cause of action.

D. Cause of Action 14 - Conspiracy

Cause of action 14 alleges Croft and ASD entered into an agreement requiring Croft to cease pursuing any action against ASD on behalf of McGinnis in exchange for the payment of attorney's fees. McGinnis bases her conspiracy claim on the assertion that after ASD paid Croft's attorneys fees on March 9, 1990, he took no further action on her behalf. while Alaska recognizes the tort of civil conspiracy, see Patterson v. State Dept. of Agriculture, 880 P.2d 1038, 1044 n.12 (Alaska 1994), cert. denied, ___ U.S. ___ 115 S. Ct. 936 (1995), the parties do not name, and the court is unable to find, an Alaska case setting out the elements of such a cuase of action. In Vieus v. East Bay Regional Park Dist., 906 F.2d 1330, 1343 (9th Cir. 1990), cert. denied, 498 U.S. 967 (1990), the Ninth Circuit explained:

> In order to prove a civil conspiracy, the parties to have conspired must have reached " a unity of

> purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." Transgo, Inc. v. Ajac Transmission Parts Corp., 78 F.2d 1001, 1020 (9th Cir. 1985) (citations omitted), cert. denied, 474 U.S. 1059, 106 C. Ct. 802, 88 L.Ed.2d 778 (1986). A civil conspiracy is a combination "of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage. Doleman v. Meiji Mut. Life Ins. Co., 727 F.2d 1480, 1482 n.3 (9th Cir. 1984) (citations omitted).

The court will use the definition in Vieus.

Croft contends that he was entitled to the $11,000 fee ASD paid to him on March 9, 1990, pursuant to AS 23.30.155, as a result of obtaining the payment of approximately $100,000 in benefits for McGinnis. Further, Croft informs the court that the $11,000 fee was approximately equal to the statutory minimum attorney's fee under AS 23.30.145 and that the written agreement entered into between ASD and Croft for the payment of fees was not a secret agreement since it was filed with the Alaska Workers Compensation Board. Additionally, Croft says that the continued to represent McGinnis after the March 9, 1990, payment. For example, Croft states that he met with McGinnis on March 21, 1990, prepared for a hearing scheduled for April 6, 1990, presented McGinnis' case at the all day hearing, filed an application to obtain additional benefits, filed an appeal from the Board's June 5, 1990, decision, obtained a second hearing date for November 16, 1990, filed two briefs and prepared for the second hearing and appeared at the Board hearing on November 16, 1990, only to find McGinnis not physically or telephonically present.

McGinnis offers no evidence of a conspiracy between Croft and ASD. She merely makes unsupported accusations. Based on the facts in the record, this court agrees with Croft that the fourteenth cause of action has no merit.

E. Cause of Action 15 - Negligent or Intentional Infliction of Emotional Distress

Croft contends that he is entitled to summary judgment on cause of action fifteen because McGinnis never suffered physical injuries. Alaska has adopted the general rule that where a tortfeasor's negligence causes emotional distress without physical injury damages may not be awarded. Hancock v. Northcutt, 808 P.2d 251, 257 (Alaska 1991). The recognized exception to the general rule where the plaintiff is shocked by observing the physical injury of a loved one has no application to the present case. In a case where the alleged emotional distress is not accompanied by physical injuries, Alaska law limits recovery to cases (1) where the emotional distress is "severe" (2) where the conduct of the tortfeasor is intentional or reckless, and (3) where such conduct is capable of being characterized as extreme or outrageous. Id. at 258 (citations omitted).

In her deposition, McGinnis testified that she suffers from headaches, irritability, nausea, and has trouble sleeping. She also states that she has not sought any help for these problems. McGinnis does not claim that the nature of these problems was serious enough to prevent her from returning to work as a teacher or to stop her from practicing law. Additionally, McGinnis fails to establish that the emotional distress she suffered was "severe," and she offers no proof that Croft's conduct was intentional or reckless nor capable of being characterized as extreme or outrageous.

In a motion for summary judgment the non-moving party may not rest upon mere allegations, but must show that there is sufficient material evidence supporting the claimed factual dispute.

Anderson, 477 U.S. at 248. McGinnis offers no such evidence. A reasonable fact-finder could not find that under Alaska law McGinnis has suffered from either negligent or intentional infliction of emotional distress.

V. CONCLUSION

For the foregoing reasons this court GRANTS the motions for partial summary judgment at dockets 200 and 207. the court GRANTS the motion for partial summary judgment at docket 212 on causes of action 10, 11, 12, 14, and 15, and DENIES summary judgment on cause of action 9 as to the additional medical expenses, interest, and penalty.

DATED at Anchorage Alaska, this 4th day of April 1997.

s/_____
JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

A94-0385–CV (JWS)

J. Josephson
L Croft
L Middleton (Middleton)
B. Owens (Jermain)
C. Stowers
S. Finley

Constitution of the United States
Amendment XIV

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Alaska Statute
AS 14.20.180: *Procedure and hearing upon notice of dismissal or nonretention.*

(a) An employer shall include in a notification of dismissal of a teacher who has not acquired tenure rights, or of a nonretention or dismissal of a tenure teacher, a statement of cause and a complete bill of particulars.
(b) The tenure teacher may, within 15 days immediately following receipt of the notification, notify the employer in writing that a hearing before the school board is requested. The tenure teacher may require in the notification that the hearing be either public or private and that the hearing be under oath or affirmation. The notification may also require the right of cross-examination be provided and that the tenure teacher b e represented by counsel and have the right to subpoena a person who has made allegations which are used as a basis for the decision of the employer.
(c) Upon receipt of the notification requesting a hearing, the employer shall immediately arrange for a hearing, and shall notify

the tenure teacher or administrator in writing of the date, time, and place of the hearing. A written transcript, tape, or similar recording of the proceedings shall be kept. Transcribed copies shall be furnished to the tenure teacher for cost upon request of the tenure teacher. A final decision of the school board requires a majority vote of the membership. The vote shall be by roll call. The final decision shall be written and contain specific findings of fact and conclusions of law. A written notification of the decision shall be furnished to the tenure teacher within 10 days of the date of the decision.

Federal Rules of Appellate Procedure
Rule 38: *Damages and Costs for Frivolous Appeals.*

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

SHERRY L. MCGINNIS,)
Plaintiff,)
)
vs.)
)
ANCHORAGE SCHOOL)
DISTRICT,)
Defendant.)
)

Case No. 3AN-89-8657 CI

ORDER GRANTING SUMMARY JUDGMENT

The court has reviewed the parties' cross-motions for summary judgment and accompanying memoranda. The court finds there are no genuine issues of material fact and that judgment should be entered as a matter of law.

The undisputed facts are that plaintiff, while employed by defendant at Dimond High School, suffered a work-related injury on or about January 7, 1988. Plaintiff was unable to return to work until her treating physician gave her a full release to return effective May 8, 1990. During such time defendant attempted to require her to elect to either return to work, go on leave without pay, or terminate her employment. Plaintiff refused to make an election. Thereafter, defendant on April 5, 1989 terminated plaintiff.

On October 19, 1989, plaintiff filed the instant action. Defendant answered the complaint on November 8, 1989. In September, 1990 it became apparent that settlement could not be reached.

Defendant has contended, until its opposition and cross-

motion for summary judgment in 1992, that plaintiff had been terminated for failure to make an election either requesting leave without pay, returning to work, or terminating. In the alternative, defendant contended in its opposition and cross-motion that by failing to request leave without pay status, returning to work, or terminating, after May 9, 1990 she was terminated because of unauthorized and unapproved absence. This contention is without merit. The court concludes that defendant had improperly terminated plaintiff prior to May 8, 1990 and that plaintiff was not legally required to offer herself for work or leave without pay status. The questions had been joined as a result of her lawsuit which was answered by the District. Neither filing the answer, nor actions taken by the District thereafter can constitute notice of termination or an unconditional offer of reinstatement of the plaintiff who had been previously terminated improperly.

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is hereby GRANTED and plaintiff shall be immediately offered reinstatement with no break in service.

Defendant's cross-motion for summary judgment is DENIED.

DATED at Anchorage, Alaska this 16 day of June, 1992.

s/_____
KARL S. JOHNSTONE
Superior Court Judge

(note: original bears logo and letterhead stylization of the school district)

ANCHORAGE
SCHOOL DISTRICT
4600 DeBarr Avenue
P.O. Box 196614
Anchorage, Alaska 99519-6614
Area Code (907) 333-9561

CERTIFIED MAIL

August 31, 1992

Sherry L. McGinnis
Suite 320
220 west 34th Avenue
Anchorage, Alaska 99503

Dear Ms. McGinnis,

This letter is to inform you that your employment with the Anchorage School District has been terminated for unauthorized absences.

It was reported that you arrived at your assignment at West High School on Tuesday morning, August 25, told the principal you would not work without a signed contract, and you were directed to go to the Personnel Department to take care of the matter.

You have neither come to the Personnel Department nor returned to your assigned location at West High School. Further, you have not contacted any District official during that period of time. Efforts to contact you have been futile since you have provided no phone number at which you can be reached. Your conduct in this matter has been clearly unprofessional.

You have now been absent from work for five days without

authorization; consequently, in accordance with Alaska Statutes Sec. 14.20.170a.(3) and School Board policy 537.61, you have been terminated. A copy of these provisions is attached.

You may request a hearing before the School Board concerning your termination, if within 15 days after receipt of this notification, you submit a written request for the hearing according to the procedure which is explained in the attachment to this letter.

Sincerely,

s/
J. Edward Lindquist
Executive Director, Personnel

cc Mark Jones, Anchorage education Association
John Patterson, Attorney, Anchorage Education Association
Brad Owens, Attorney, Anchorage School district
John Alexander, Director, Contract Administration
Lance Bowie, Principal, West High School
Bill Mell, Executive Director, secondary education

Attachments: School Board Policy 537.61 and AS 14.20.170 and 14.20.180

Appendix I

RECEIVED
Office of the Clerk
U.S. Court of Appeals
Public Information Unit
99 Feb-5 PM 4:44

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHERRY McGINNIS,	) Docket Nos.:	97-35638
Plaintiff and Appellant,	)	97-35829
	)	97-36030
v.	)	98-35297
	)	
ANCHORAGE SCHOOL	) Consolidated	
DISTRICT, ANCHORAGE	)	
EDUCATION	)	
ASSOCIATION, and	)	
CHANCEY CROFT and	) U.S. District Court Docket No.:	
JOHN PATTERSON as	) CV-94-00385-JWS	
individuals	)	
Defendants and	)	
Appellees.	)	
	)	

RESPONSE TO THE PANEL'S ORDER
FILED JANUARY 27, 1999

Paul Grinvalsky
Attorney for Appellant
4978 Niagara Avenue, Suite 36
San Diego, CA 92107
(619) 221-8227
Attorney for Plaintiff/Appellant

TABLE OF CONTENTS

Page

I. Upon Application Of Alaska Statutes And Precedent Authority To The Material Facts, The Appeals Are Shown To Be Meritorious: Therefore, Cause For Sanctions Is Absent 1

II. Docket 97-35638; Anchorage School District; Wrongful Termination Of Teacher's Tenured Employment 4

A. Material Facts as to non-reinstatement/ wrongful termination of tenure 4

B. Applicable Law as to non-reinstatement/ wrongful termination of tenure 11

1. Tenure reinstatement 11

2. Wrongful termination of tenure - denial of due process 13

3. Employer's conversion of $2,761 salary is probative evidence that the employer has since 1987 acted out of spite and in bad faith in its dealings with teacher 15

III. Dockets 97-35829 & 97-36030; Anchorage Education Association & John Patterson; Attorney Malpractice In Breach Of Contract And In Breach Of Common Law Duties 17

A. Material Facts as to Patterson's breach(s) of the duty to render competent legal services 17

TABLE OF CONTENTS, continued

Page

B. Applicable Law as to Patterson's breach(s) of the duty to render competent legal services 19
1. Incompetence; erroneous legal advice 19
2. Breach of contracted duties to recover tort and contract damages 21
3. AEA is liable for Patterson's negligence and breach of contract 23

IV. Docket 98-35297; Chancey Croft; Attorney Malpractice In Breach Of Contract And In Breach Of Common Law Duties 24

A. Material Facts as to Croft's breach(s) of the duty to render competent legal services 24

B. Applicable Law as to Croft's breach(s) of the duty to render competent legal services 26
1. Breach of contracted duties to recover workers' compensation benefits 26
2. Incompetence; withholding client files, failing to communicate with the client, "abandoning" pending litigation 30

TABLE OF CONTENTS, continued

Page

V. All Four Appeals - Dockets 97-35638, 97-35829, 97-36030 & 98-35297; Negligent and Intentional Infliction Of Emotional Distress 31

VI. Conclusion - The Appeals Were Required In Order To Correct Manifest Errors Of The Court Below: Therefore, Fed.R.App.P., Rule 38 Sanctions Cannot Be properly Levied Against Teacher 33

Affidavit Of Counsel As To Arrangements Made In Advance To Attend Oral Argument 34

told her she should contact Cecelia Lobdell in the Personnel office to check on the status or whereabouts of her contract; however, she did not do so, at least as far as I know, while she was in my office.

7) We also talked about other things while we were discussing the whereabouts of her contract, such as her books and class materials and the schedule for classes and in-service. She accused me of failing to keep my promise to send her this information; I tried to explain to her that I was unable to contact the Language Arts Department chair and get the material she requested, but I attempted to take responsibility for the oversight and apologized to her. She remained insistent that I had not kept my word to her to get these materials to her and I kept trying to apologize and get her to understand it was an oversight.

8) Eventually, when we were not able to locate her contract at West, I suggested that she go to the Personnel office to see if it was there, since that is where the teacher contracts are normally kept. She indicated that she intended to leave West, I thought to go to personnel to see about her contract; I suggested to her that she might want to first come to the teacher's meeting which had just begun so that I could introduce her to her colleagues. However, she refused my invitation and left West with the man who had accompanied her.

9) I never again saw or spoke with McGinnis after she left West High School on the morning of August 25, 1992. After a day or two, I contacted Secondary Education to obtain a substitute to prepare for and cover McGinnis' 10th grade English classes, since students were returning to school the next week. When McGinnis did not

return at all, I understand she was terminated and I filled her position with a permanent replacement.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED: 12/13/96

s/_____
Lance Bowie

SUBSCRIBED AND SWORN to before me this 13 day of December, 1996.

s/_____
Notary Public in and for Alaska

My Commission Expires 10/12/99

Contents of Stamp:
Regina R. Butler
Notary Public
State of Alaska
My Commission Expires October 12, 1999

17. At no time after I withdrew in November, 1990 did I ever tell Ms. McGinnis that I would pursue any further claim for her with the Board. I did seek attorney fees at the Board in late 1991 but abandoned that effort after the adjuster calculated the amount of interest to be no more than $27. At no time did Charles Coe ever contact me about Mc. McGinnis' workers' compensation claim. I knew in the fall of 1991 that the appeal Coe filed for McGinnis had been dismissed. To me this was further evidence she had abandoned her claim.

Dated at Anchorage, Alaska this 20th day of December, 1996.

CHANCY CROFT LAW OFFICE

s/_____
CHANCY CROFT
ABA # 6404010

SWORN AND SUBSCRIBED to before me this 20th day of December, 1996.

(no notary stamp and signature not legible)

s/_____
Notary Public for the State of AK

Commission Expires: 12/4/98